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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NEW ORLEANS 2000 PARTNERSHIP,
Petitioner,

v.

BOARD OF COMMISSIONERS
OF THE NEW ORLEANS EXHIBITION HALL AUTHORITY,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, of Louisiana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the valuation of an expropriated parcel of land which is less than one-half of the parcel's fair market value at the time of trial is inconsistent with this Court's decision in *Kirby Forest Industries, Inc.* v. *United States,* 467 U.S. 1 (1984), interpreting the Just Compensation Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

All of the parties are listed in the caption.

STATEMENT PURSUANT TO RULE 29.1

Petitioner New Orleans 2000 Partnership has no parent or subsidiary corporations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
STATEMENT PURSUANT TO RULE 29.1	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	10
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page
Boom Co. v. *Patterson*, 98 U.S. 403 (1878)	12
Bundy v. *Dugger*, 675 F. Supp. 622 (M.D. Fla. 1987), *aff'd*, 850 F.2d 1402 (11th Cir. 1988)	11
Chicago B. & Q. R.R. v. *Chicago*, 166 U.S. 226 (1897)	2
Department of Transp. v. *Lundberg*, 825 P.2d 641 (Ore.), *cert denied*, 113 S. Ct. 467 (1992)	18
Feigenbaum v. *City of Waterbury*, 565 A.2d 5 (Conn. App. Ct. 1989)	11
Kirby Forest Indus., Inc. v. *United States*, 467 U.S. 1 (1984)	*passim*
Louisiana v. *Constant*, 369 So. 2d 699 (La. 1979)	9
Mitchell v. *United States*, 267 U.S. 341 (1925)	12
Olson v. *United States*, 292 U.S. 246 (1934)	10, 12, 13
Opinion of the Justices, 555 A.2d 1095 (N.H. 1989)	19
Religious of the Sacred Heart v. *City of Houston*, 836 S.W.2d 606 (Tex. 1992)	18
San Diego Gas & Elec. Co. v. *City of San Diego*, 450 U.S. 621 (1981)	17
Seravalli v. *United States*, 845 F.2d 1571 (Fed. Cir. 1988)	15
United States v. *100.80 Acres of Land*, 657 F. Supp. 269 (M.D.N.C. 1987)	18
United States v. *104 Acres*, 666 F. Supp. 1017 (W.D. Mich. 1987)	18
United States v. *27.93 Acres of Land*, 924 F.2d 506 (3d Cir. 1991)	18
United States v. *564.54 Acres of Land*, 441 U.S. 506 (1979)	13, 14
United States v. *62.50 Acres of Land*, 953 F.2d 886 (5th Cir. 1992)	18, 20
United States v. *68.94 Acres of Land*, 918 F.2d 389 (3d Cir. 1990)	14
United States v. *69.1 Acres of Land*, 942 F.2d 290 (4th Cir. 1991)	18, 19
United States v. *7.92 Acres of Land*, 769 F.2d 4 (1st Cir. 1985)	18

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Commodities Trading Corp.*, 339 U.S. 121 (1950)	17
United States v. *Cors*, 337 U.S. 325 (1949)	17
United States v. *Fuller*, 409 U.S. 488 (1973)	17
United States v. *L.E. Cooke Co.*, 991 F.2d 336 (6th Cir. 1993)	16, 18, 20, 21
United States v. *Miller*, 317 U.S. 369 (1943)	13
United States v. *Reynolds*, 397 U.S. 14 (1970)	14, 16
United States v. *Virginia Elec. & Power Co.*, 365 U.S. 624 (1961)	17
Washington Metro. Area Transit Auth. v. *One Parcel of Land*, 780 F.2d 467 (4th Cir. 1986)	17
Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980)	2
Yaist v. *United States*, 17 Cl. Ct. 246 (Cl. Ct. 1989)	18
Yancey v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990)	18, 19, 20

STATUTES

U.S. Const. amend. V	2
amend. XIV	2
La. Const. art. I, § 4	9
La. Rev. Stat. Ann. tit. 4, § 525	5

OTHER AUTHORITIES

Jeffrey Meitrodt, *Canizaro Negotiating Land Sale*, The Times-Picayune, April 12, 1994	14

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PETITION FOR A WRIT OF CERTIORARI

New Orleans 2000 Partnership petitions for a writ of certiorari to review the judgment of the Court of Appeal, Fourth Circuit, of Louisiana.

OPINIONS BELOW

The opinion of the Court of Appeal, Fourth Circuit, of Louisiana (App. at 1a-35a) is reported at 625 So. 2d 1070. The order of the Supreme Court of Louisiana (App. at 36a-37a) denying the writ of certiorari is reported at 630 So. 2d 802. The order of the Civil District Court for the Parish of Orleans, Division J (App. at 38a) entering judgment is not reported.

JURISDICTION

The judgment of the Court of Appeal of Louisiana was entered on September 22, 1993. A petition for rehearing for the limited purpose of clarifying the Court of Appeal's prior remand order was granted on November 18, 1993. The petition for a writ of certiorari was denied by the Supreme Court of Louisiana on January 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This case raises the fundamental question under the Just Compensation Clause of whether a $13 million compensation award for an expropriated parcel of land with an *undisputed* fair market value at the time of trial estimated between $28.4 million and $32.4 million violates the Fifth and Fourteenth Amendments of the Constitution.[1] This dispute arose in September 1991 from the efforts of the Board of Commissioners of the New Orleans Exhibition Hall Authority ("NOEHA") to expropriate 22.85 acres of a 72-acre tract adjacent to the New Orleans Convention Center. In June 1991, petitioner New Orleans 2000 Partnership ("N.O. 2000") had entered into a binding written contract to purchase the

[1] The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 160 (1980); *Chicago B. & Q. R.R.* v. *Chicago*, 166 U.S. 226, 239 (1897).

72-acre tract from Missouri Pacific Railroad Company ("MOPAC"),[2] and thus N.O. 2000 was the owner of the 22.85-acre parcel at the time of the expropriation. Although the trial court's compensation award was less than one-half of the undisputed fair market value of the tract at the time of trial, the award was affirmed by the Court of Appeal of Louisiana. The Supreme Court of Louisiana denied N.O. 2000's petition for review.

1. In April 1989, MOPAC decided to sell a 72-acre tract that was located adjacent to New Orleans' central business district and upriver from the New Orleans Convention Center. At the time, the tract was the largest undeveloped space in the downtown area. NOEHA, a political subdivision of the State of Louisiana authorized to operate the convention center, expressed interest in purchasing MOPAC's 72-acre tract in order to expand the convention center area, but NOEHA lacked the necessary funds.[3] At NOEHA's request, the City of New Orleans signed an agreement with MOPAC to purchase the tract for $12 million in December 1989. However, the city backed out of the deal shortly thereafter, citing the $5 million estimated cost of cleaning up potential environmental contamination of the site.

Throughout 1990 and the early part of 1991, NOEHA continued its efforts to purchase the tract. NOEHA and MOPAC were unable to reach agreement, primarily because MOPAC wanted to sell the entire 72-acre tract while NOEHA wanted to purchase only 22.85 acres along

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[2] Although Missouri Pacific was acquired by and merged into Union Pacific Corporation, the combined entity will be referred to as "MOPAC."

[3] NOEHA intended to use the expropriated land to expand the convention center and provide for truck marshalling areas. On July 24, 1992, the New Orleans City Planning Commission adopted a master plan for the riverfront area, which discouraged truck mashalling in the area. Rec. at PE-182. On April 15, 1993, the City Council adopted a revised plan that *prohibited* truck marshalling in the area.

the Mississippi River. Because of its location along the river, this 22.85-acre parcel was unquestionably the most valuable part of the 72 acres and could command a premium price.

Due to its deficit operations and its lack of direct access to state funds, NOEHA could not afford to purchase all of MOPAC's land, even at a discounted price. NOEHA's efforts were further hampered by the December 1990 defeat of a city bond issue to raise financing for the purchase of the site for the convention center expansion and government office development. Nevertheless, NOEHA offered $8 million for the entire property in January 1991, although it was completely unclear whether NOEHA could raise more than $6 million for any land purchase. Rec. at Vol 35, p. 9. After rejecting NOEHA's offer, MOPAC began serious negotiations with petitioner N.O. 2000, which planned to take advantage of the site's superb location and develop the property for a non-industrial, mixed-use complex. In February 1991, MOPAC agreed to sell all 72 acres to petitioner for $11 million and so advised NOEHA. The purchase agreement was signed on June 11, 1991, with the formal closing set for September 11, 1991.

Despite the agreement that had been reached between MOPAC and N.O. 2000, NOEHA continued to offer ridiculously low sums for the property. On two occasions in May and June 1991, NOEHA offered $4 million for *half* of the 72 acres. On September 6, 1991, while MOPAC and N.O. 2000 were in the process of closing, NOEHA offered to purchase the 22.85-acre parcel for $5.5 million. Meanwhile, NOEHA rushed to prepare and file its expropriation suit before the closing between MOPAC and N.O. 2000. On September 10, 1991, one day before the scheduled closing, NOEHA filed suit to expropriate the 22.85 acres, despite the fact that its purchase offer was to remain open until September 12. The next day, pursuant to the terms of the June 11, 1991

agreement, N.O. 2000 closed on the 72 acres for $11 million.

2. On July 8, 1992, the Civil District Court for the Parish of Orleans concluded that NOEHA had demonstrated public necessity for the expropriation and that the valuation of the 22.85 acres would be determined at a jury trial in December 1992.

Between the time of the June 1991 purchase agreement and the December 1992 valuation trial, two significant events occurred that greatly increased the attractiveness of the already valuable 22.85-acre parcel: the Louisiana legislature legalized riverboat gambling in July 1991 and casino gambling in June 1992.[4] The location of the expropriated parcel along the Mississippi River made the land well-suited for docking riverboats. The proximity of the parcel to the planned Rivergate casino—less than one mile away—made the parcel an ideal location for a new hotel and parking lots to accommodate the expected tourists. Restaurants and retail stores also were likely to locate in the area.

Not only had legalized gambling increased the desirability of the parcel, but the environmental contamination concerns that had caused NOEHA to back out of the December 1989 purchase agreement were resolved. On June 1, 1992, the Louisiana Department of Environmental Quality placed the property in the "No Further Action" category, thus making environmental cleanup unnecessary. Bowes Appraisal at 31. The cost of the expected cleanup had been estimated at $5 million. Rec. at Ex. D-20; Vol. 18, pp. 52-53.

Prior to the valuation trial, NOEHA sought a ruling from the trial court that September 11, 1991, the filing

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[4] The new Louisiana gambling laws provided that each parish would be allowed up to six riverboats and that the only casino would be located at the former Rivergate Convention Hall site in New Orleans near the Mississippi River. *See* La. Rev. Stat. Ann. tit. 4, § 525.

date of the expropriation suit, was the proper date for the parties to value the 22.85-acre parcel. N.O. 2000 moved instead to have the date of valuation set as the date of trial. Relying on *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), the trial court granted the motion of N.O. 2000 and held that the trial date was the valuation date.

3. Despite the court's ruling over a month before the trial as to the proper valuation date, NOEHA acted at is own peril and presented at trial the testimony of three appraisers regarding the parcel's valuation as of the *filing date* of September 10, 1991—more than a year prior to the trial date and without regard to the legalization of gambling on the Mississippi River. All of NOEHA's appraisers agreed that based on the situation existing at that time the highest and best use of the property was heavy industrial use with possible future development. App. at 18a. The appraised value of the 22.85-acre parcel was estimated under the comparable sales method for that type of property as: $5,534,530 (Jimmie Thorns, Jr.); $5,525,000 (Robert Merrick); and $5,250,000 (Charles Seymour). *Id.*[5]

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[5] Although the legalization of casino gambling post-dated the September 10, 1991, "as of" date of NOEHA's appraisals, riverboat gambling was legalized prior to this date. However, NOEHA's appraisals relied on heavy industrial "comparables" and virtually ignored the economic impact of riverboat gambling on the parcel's value, taking the counterintuitive position that legalized gambling would either not affect property values or would affect them only slightly. *See* Thorns Appraisal at 2 ("it is the feeling of this appraiser, at the time of the appraisal, [that] the riverboat gaming authorization did not promote increases in land value"); Merrick Appraisal at 3 ("[t]he impact of either land based or riverboat gaming on the subject site is difficult to measure"); Seymour Appraisal at 16 ("we believe that the coming of gambling does have some modest positive effect on the value of the subject property. But the increment to present worth must clearly be discounted substantially and applied with caution").

Petitioner, on the other hand, presented the testimony of John Beckman, an expert in urban planning, who concluded that the highest and best use of the property in light of the new gambling opportunities was a non-industrial, mixed-use development comprising hotels, office buildings, and high-rise residential units. *Id.* at 19a. Although the property was zoned for industrial use at the time of trial, Beckman explained that every study and plan by the City of New Orleans of the riverfront area contemplated multi-use development of the area, thus suggesting that such use was likely to be approved in the near future. Rec. at Vol. 34, pp. 64-79.

Petitioner then presented the testimony of two appraisers as to the value of the parcel under the comparable sales method *on the date of trial*: $28,400,000 (Peter Bowes) and $32,360,730 (Jean Felts). App. at 19a. Both appraisers opined that market perceptions about riverboat and casino gambling *on that date* had caused the fair market value of the parcel to increase significantly.

Specifically, the Felts appraisal concluded that the parcel would be a desirable location for a 1,000 room hotel, a separate riverfront condominium/rental development, and terminals to service the riverboats. Felts Appraisal at 42. In the predevelopment period, the parcel would be well-suited for parking facilities to accommodate the existing tourists who visited the city's French Quarter and the new tourists who would patronize the nearby casino and riverboats. *Id.* at 41-42.[6]

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[6] The Bowes appraisal reached similar conclusions about the possible uses of the 22.85 acres. Bowes also described the "jump start" that gambling had provided to the depressed real estate market in New Orleans and the skyrocket in land prices that had resulted from land speculation. Bowes Appraisal at 41.

NOEHA presented no evidence as to the valuation of the parcel as of the trial date. Instead, on rebuttal and over petitioner's objection, it chose to rely on the single statement of one of its appraisers, Mr. Thorns, that the value of the parcel had not changed significantly between September 1991 and December 1992. App. at 18a, 20a. Earlier in the trial, Mr. Thorns and NOEHA's other appraisers had testified that their studies had not gone beyond September 10, 1991. Notwithstanding the fact that *only* petitioner's appraisers provided competent testimony about the parcel's valuation as of the trial date, petitioner was awarded a mere $13 million, less than half of the undisputed appraised value of the expropriated property as of the trial date.

Petitioner appealed, and contended that NOEHA's rebuttal statement lacked a factual basis and should have been excluded. Petitioner also contended that the trial court erred in denying petitioner's motions for a directed verdict and judgment notwithstanding the verdict, both of which would have set the value of the expropriated property at $28,400,000.[7]

4. The Court of Appeal, Fourth Circuit, affirmed. First, it held that under Louisiana case law, the value of expropriated property is as of the filing date of the expropriation suit. *Id.* at 14a-18a & n.5.[8] The court concluded, however, that *Kirby* prohibits a court from considering the filing date as the valuation date when there has been a subsequent increase in the property's value. *Id.* at 15a-16a. Having correctly recognized the applica-

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[7] The Court of Appeal's opinion incorrectly noted that N.O. 2000's JNOV motion sought to have the parcel valued at $28,300,000. *See* App. at 21a.

[8] Citing *State* v. *Landry*, 53 So. 2d 908, 910 (La. 1951); *Louisiana Ry. & Navigation Co.* v. *Baton Rouge Brickyard*, 67 So. 922, 924 (La. 1915); *City of New Orleans* v. *Giraud*, 346 So. 2d 1113, 1118 (La. Ct. App. 1977).

bility of *Kirby*, the court then proceeded to examine the justness of the compensation under both the United States and Louisiana Constitutions.[9] The court affirmed the compensation award, finding that Mr. Thorns' rebuttal testimony was properly admitted and that the testimony was enough to create a question of fact as to the value of the expropriated property. *Id.* at 21a-22a. Alternatively, the court speculated that the $13 million award was reasonable even without the rebuttal testimony:

> [T]he jury could have reasonably arrived at a value lower than N.O. 2000's lowest estimate by comparing the methods of valuation and the comparables used by NOEHA's experts in its case in chief with those used by N.O. 2000's experts, *even though each set of experts used a different date of valuation.*

Id. at 22a (emphasis added).

One judge, Judge Waltzer, filed a concurring opinion noting that she would not have relied on *Kirby*, because the longstanding rule in Louisiana is that the filing date of the suit is the valuation date. *Id.* at 24a. However, regardless of the valuation date, she would have found the $13 million award to be supported by the record. *Id.*

The Court of Appeal granted NOEHA's rehearing application for the limited purpose of clarifying the remand order. The case was remanded to the district court solely to determine attorney's fees, costs, and interest. The Supreme Court of Louisiana denied N.O. 2000's petition for review.

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[9] The Louisiana Constitution is similar to the Fifth Amendment in its requirement that property may not be taken without just compensation. *See* La. Const. art. I, § 4. The Louisiana Constitution differs slightly in its requirement that "[i]n every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss." *Id.* This provision was intended to broaden recovery to include, *inter alia*, attorney's fees, court costs, and business profits. *See Louisiana* v. *Constant*, 369 So. 2d 699, 701 (La. 1979).

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeal of Louisiana raises the fundamental issue of how to value expropriated property under the Just Compensation Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. The court's approval of a valuation that was less than one-half of the undisputed fair market value measured on the correct date—the trial date—deprives the holding in *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), of all meaning. Not only is the decision below plainly wrong as a matter of law, but it also reflects a growing confusion among lower courts over the method by which expropriated property should be valued. Review by this Court is therefore necessary to clarify the standards for determining fair market value.

1. In *Kirby*, this Court reaffirmed the principle that fair market value is measured by what a "willing buyer" would pay to a "willing seller" at the time of the taking. 467 U.S. at 10 (quoting *United States* v. *Miller*, 317 U.S. 369, 374 (1943)); see also *Olson* v. *United States*, 292 U.S. 246, 255 (1934) (condemnee "entitled to be put in as good a position pecuniarily as if his property had not been taken"). *Kirby* recognized the "convention" adopted by courts that the commencement of the trial is the date of valuation. 467 U.S. at 17. In *Kirby*, however, the actual taking did not occur until three years *after* the trial date, and the value of the land had increased in the interim period. A unanimous Court held:

> However reasonable it may be to designate the date of trial as the date of valuation, if the result of that approach is to provide the owner *substantially less* than the fair market value of his property on the date [of the taking], it violates the Fifth Amendment.

Id. (emphasis added). The case was remanded for a modification of the compensation award in light of the material change in land value.

Kirby thus stands for the dual propositions that the fair market value of expropriated property must be measured as of the trial date and that the failure to account for an increase in market value violates the Fifth Amendment. In *Kirby*, the lower courts had failed to account for the appreciation that had occured after the trial and before the taking. The instant case involves the similar, but even more compelling, situation of appreciation that occurred after the filing of the expropriation suit and before the trial.

2. This Court should review the instant case because the compensation award was "substantially less" than the undisputed fair market value of the expropriated parcel at the time of the valuation trial. What makes the valuation issue so stark here is that there was a fundamental difference between the parties as to the proper set of assumptions concerning the highest and best use of the property. Because NOEHA relied upon an impermissible valuation date, its experts concluded that the property would have a particular use without regard to gambling. Petitioner's experts testified, based on the correct valuation date, that beyond question gambling on the river would increase the market value of the property.

Quite obviously, the $13 million award was based on a blend of NOEHA's outdated appraisals and those offered by petitioner. But NOEHA's appraisals should never have been presented to the jury, because they embodied a manifestly incorrect assessment of the market based on the wrong valuation date. This blending by the fact-finder of invalid and valid appraisals ensured that the compensation was below the market value and therefore squarely conflicted with the ultimate holding in *Kirby*.[10]

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[10] The logic of this argument is supported by the settled rule that when a fact-finder is faced with two conflicting expert appraisals, it must decide which is more credible. *See Feigenbaum* v. *City of Waterbury*, 565 A.2d 5, 7 (Conn. App. Ct. 1989); *cf. Bundy* v. *Dugger*, 675 F. Supp. 622, 634 (M.D. Fla. 1987) (conflict-

Accordingly, the Court of Appeal disregarded both the undisputed facts before it [11] and this Court's decisions interpreting the Just Compensation Clause.

The Court's legal analysis in this area is grounded in the proposition that just compensation should be based on the fair market value at the time of the taking. *Kirby*, 467 U.S. at 10. All non-speculative factors that affect fair market value *must* be considered in determining compensation. See *Olson* v. *United States*, 292 U.S. 246, 255, 257 (1934). In the instant case, it could hardly be said that the appreciation of the parcel's value, which resulted from the legalization of gambling, was unduly speculative. The expropriated parcel's location, both along the Mississippi River and near the planned Rivergate casino, made it a natural focal point for riverboat and casino operators and tourist businesses catering to the expected gambling patrons. Consequently, the determination of the parcel's value should have reflected "the adaptability for use in a particular business," namely, gambling. *Mitchell* v. *United States*, 267 U.S. 341, 344 (1925).[12]

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ing expert psychiatric opinions), *aff'd*, 850 F.2d 1402 (11th Cir. 1988). It cannot simply "blend" or "average" the valuations in the conflicting appraisals, particularly when the appraisals disagree about the "highest and best use" of the property.

[11] Counsel for petitioner has been unable to find any post-*Kirby* just compensation case, either federal or state, in which a court disregarded an appraisal with a valuation date as of the trial date and instead relied on an appraisal conducted more than a year before the trial date.

[12] Almost 50 years before *Mitchell*, the Court declared that the adaptability of land for a particular purpose was a proper element in determining the value of expropriated land. *Boom Co.* v. *Patterson*, 98 U.S. 403 (1878). There, the location of the land on three islands in the Mississippi River made them a natural "log boom." The Court found that "[t]he position of the three islands . . . added largely to the value of the lands. . . . Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." *Id.* at 408. The logic of *Patterson* requires a retrial in this case.

At the time of the valuation trial in December 1992, legalized gambling in New Orleans was not merely a fanciful dream; both riverboat and land-based gambling already had been approved, and interested gambling operators were in the process of submitting bids and obtaining the necessary regulatory approvals. Petitioner's appraisers were thus unquestionably correct in considering the impact of gambling on the parcel's potential use in their valuations of the property. See *Olson*, 292 U.S. at 255 (fair market value considers "[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed *in the reasonably near future*") (emphasis added).

NOEHA also did not contend, nor did the Louisiana courts conclude, that the market value was " 'too difficult to find.' " *Kirby*, 467 U.S. at 10 n.14 (quoting *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)); see also *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 513 (1979) (noting that public facilities such as roads and sewers are difficult to value because they are infrequently sold). The Louisiana courts had at their disposal petitioner's thoroughly researched appraisals analyzing the effect of both land-based and riverboat gambling on the value of the expropriated parcel. In fact, both of petitioner's appraisals specifically examined the effect that riverboat gambling had had on the waterfront land prices in Biloxi, Mississippi, another area that recently had legalized riverboat gambling. The Biloxi data demonstrated a dramatic increase in land prices after gambling was legalized there. Even if there remained some uncertainty about the parcel's potential use, this Court has noted that economic evaluations, such as appraisals, often depend on assumptions, and therefore some amount of speculation is permissible in establishing market value. See *United States* v. *Miller*, 317 U.S. 369, 374-75 (1943); *cf. Kirby*, 467 U.S. at 17 ("prediction of the value of land at a future time is notoriously difficult").

Finally, this is not a case in which a monetary award could not provide full compensation to a landowner because of the land's "special value" or other subjective quality. See *id.* at 10 n.15; *564.54 Acres of Land*, 441 U.S. at 511-12. Rather, this is a case in which the compensation award failed to take into account *objective* market data that the land was in greater demand due to the legislature's approval of riverboat and casino gambling.[13] Indeed, this Court has stated that landowners should be compensated for land appreciation that results from governmental actions of this type:

> [T]he development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project *or for some other public purpose*, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of *all available economic uses* of the property at the time of the taking.

United States v. *Reynolds*, 397 U.S. 14, 16-17 (1970) (emphases added).

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[13] Recent newspaper articles have indicated that petitioner has received offers to purchase the remaining 49 acres for $35 million, or $16.40 per square foot, *see* Jeffrey Meitrodt, *Canizaro Negotiating Land Sale*, The Times-Picayune, April 12, 1994, at A1, a much higher figure than the $13.00 per square foot that the Louisiana courts awarded for the *more desirable* 22.85-acre parcel. These recent offers are much closer to petitioner's expert appraisals which were based on the potential interest of riverboat operators, who now in fact have made offers to purchase the less desirable portion of the property. In fact, a final agreement has been reached, and the actual sales price is $37.5 million, slightly higher than the published reports. This new development should be considered in determining whether the compensation award complied with the commands of the Fifth Amendment. *See United States* v. *68.94 Acres of Land*, 918 F.2d 389, 398 (3d Cir. 1990) (noting that the majority of circuit courts have allowed the introduction of post-taking comparable sales).

In sum, the Court of Appeal approved a methodology for determining just compensation that was calculated to undervalue the expropriated property, in direct violation of the constitutional requirement in *Kirby*. As a general matter, where the parties offer appraisals based on wildly disparate assumptions, the court must be certain that both sets of assumptions are legally valid. If one is not, then it is fundamentally unfair to allow that appraisal to be presented to the jury. Because the Court of Appeal approved an award that was clearly influenced by an appraisal that was invalid under *Kirby*, the decision below warrants review by this Court.

3. At a minimum, *Kirby* dictates that the starting point for determining just compensation is the property's value at the time of trial. That value, according to *Kirby*, will change if the expropriated land appreciates (or depreciates) before the actual taking occurs. Here, the Louisiana Court of Appeal correctly recognized that the parcel's value should have been based on its market value as of the valuation trial in December 1992. Consequently, the court should have disregarded those appraisals with "as of" dates prior to the trial date, that is, the three appraisals submitted by NOEHA. It did not. Instead, the Court of Appeal, like the jury, chose to "split the baby" in clear derogation of the holding in *Kirby*.

Here, the Court of Appeal apparently used the *filing date* of the expropriation (September 10, 1991) as its starting point and measured any appreciation from that date. See *supra* at p. 9. Assuming *arguendo* that NOEHA's appraisals were valid—and their failure to consider gambling's impact on the parcel's value demonstrates that they were not [14]—the appraisals were con-

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[14] *See Seravalli* v. *United States*, 845 F.2d 1571, 1575 (Fed. Cir. 1988) ("any appraisal method 'must take into account all market conditions affecting price, for example, the availability of financing, the marketing techniques used, and the relevant real estate market' ") (citation omitted).

ducted more than a year before the date of trial and should never have been admitted by the trial court, submitted to the jury, or allowed to play a role in the Court of Appeal's decision. The Court of Appeal thus erred when it sought to justify the reasonableness of the $13 million award by comparing it to NOEHA's appraisal estimates as of the wrong date ($5.2 million to $5.5 million) and petitioner's proper appraisal estimates ($28.4 million to $32.3 million).[15] See App. at 22a. Because the $13 million award fell almost halfway between the high and low figures of the parties' appraisals, the court reasoned that the award was appropriate.

This justification for "splitting the baby" is fundamentally flawed. A comparison of this type would have been proper only if all of the appraisals were as of the trial date. See *United States* v. *L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993). Here, NOEHA's appraisals clearly were not credible. Had the Court of Appeal instead compared the $13 million award to only the undisputed market values in petitioner's appraisals, it would have concluded that the award could not satisfy the standard of just compensation. Because the court relied on appraisals that were not proper, the compensation awarded to N.O. 2000 was constitutionally inadequate.

4. In its interpretations of the Fifth Amendment, this Court has stated that the "basic measurement of compensation has been hedged with certain refinements in the interest of effectuating the constitutional guarantee." *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970). *Kirby* was an important "refinement" because of its recognition of changing market values. As illustrated by the

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[15] Even if the Louisiana court's valuation theory were plausible, the $13 million award still might fail to satisfy the just compensation requirement. *See Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 17 (1984) (despite the government's "plausible explanation for [a] valuation procedure," the Fifth Amendment was not satisfied).

instant case, however, *Kirby's* potency is diminished when lower courts improperly value the potential use of expropriated property. See *Washington Metro. Area Transit Auth.* v. *One Parcel of Land,* 780 F.2d 467, 471 (4th Cir. 1986) ("courts are often ill-equipped to umpire between competing experts with their typical parade of appraiser's argot and jargon in evaluation cases"). Consequently, this case presents the Court with a unique opportunity to define more precisely the standards for determining the fair market value of expropriated property, particularly when there has been a material increase or decrease in value. *Cf. San Diego Gas & Elec. Co.* v. *City of San Diego,* 450 U.S. 621, 659 (1981) (Brennan, J., dissenting) (expressing the need to develop additional rules of valuation for temporary regulatory takings).

Despite the Court's enunciation of broad principles regarding what constitutes fair market value, see *supra* at pp. 12-14, it has been careful "not to reduce the concept of 'just compensation' to a formula." *United States* v. *Cors,* 337 U.S. 325, 332 (1949); see also *United States* v. *Virginia Elec. & Power Co.,* 365 U.S. 624, 633 (1961) (concept of fair market value is "not an absolute standard nor an exclusive method of valuation"); *United States* v. *Commodities Trading Corp.,* 339 U.S. 121, 123 (1950) ("[t]his Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases"). Instead, the calculation of just compensation should be governed by "basic equitable principles of fairness." *United States* v. *Fuller,* 409 U.S. 488, 490 (1973).

Kirby alluded to the need for a "more easily administrable way of ensuring that the compensation paid to the owner of condemned land does not fall substantially below the fair market value of the property on the date of the taking," *Kirby Forest Indus., Inc.* v. *United States,* 467 U.S. 1, 19 n.30 (1984). However, *Kirby* provided limited guidance to lower courts on the critical issue of the type of evidence that should be considered

in the determination of changing market value and how such evidence should be evaluated.[16] In fact, the Court noted that "[n]one of the discussion in this opinion is intended to modify either the manner in which the fair-market-value standard is interpreted and applied or the test for determining when the fair-market-value standard must be supplanted by other formulae." *Id.*

Left to fashion their own theories of just compensation, lower courts have reached widely varying conclusions as to the appropriate compensation required by the Fifth Amendment. Several courts have chosen to adopt approaches that are manifestly supportive of the "highest and best use" method for evaluating what constitutes just compensation,[17] while others have adopted approaches far less likely to ensure just compensation.[18] How fair market value should be determined under the Just Compensation Clause also has been a vexing issue for state courts.[19]

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[16] Nevertheless, the Court expressed confidence that on remand the district court could "easily adduce evidence" regarding the change in market value. *Kirby*, 467 U.S. at 18. Arguably, the facts in *Kirby* did not lend themselves to a full explication of the proper method of determining changed market value. There, the expropriated land was a parcel of timberland that apparently had no potential use other than as timberland.

[17] *See, e.g., United States* v. *69.1 Acres of Land*, 942 F.2d 290 (4th Cir. 1991) (sand mining site); *Yancey* v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990) (turkey breeder stock); *United States* v. *104 Acres*, 666 F. Supp. 1017 (W.D. Mich. 1987) (farmland used to grow corn); *United States* v. *100.80 Acres of Land*, 657 F. Supp. 269 (M.D.N.C. 1987) (sand mining site).

[18] *See, e.g., United States* v. *L.E. Cooke Co.*, 991 F.2d 336 (6th Cir. 1993); *United States* v. *62.50 Acres of Land*, 953 F.2d 886 (5th Cir. 1992) (clam shell mining site); *United States* v. *27.93 Acres of Land*, 924 F.2d 506 (3d Cir. 1991) (enterprise district); *United States* v. *7.92 Acres of Land*, 769 F.2d 4 (1st Cir. 1985) (seashore property); *Yaist* v. *United States*, 17 Cl. Ct. 246 (Cl. Ct. 1989) (partially submerged island).

[19] *See, e.g., Religious of the Sacred Heart* v. *City of Houston*, 836 S.W.2d 606 (Tex. 1992) (religious school); *Department of*

The confusion surrounding just compensation and fair market value is magnified when uncertainties surround the potential use of the expropriated property.

Several post-*Kirby* decisions illustrate the different approaches taken by courts. On one hand, a number of courts have favorably reviewed requests by landowners to ensure that they will receive the true market value of what has been taken from them. For instance, in *United States* v. *69.1 Acres of Land*, 942 F.2d 290 (4th Cir. 1991), the Fourth Circuit affirmed a compensation award of $456,900, the amount requested by the landowner, despite the government's contention that the property was worth between $54,000 and $63,000. *Id.* at 292. The higher value was justified by the land's potential use as a commercial sand mining facility. The Fourth Circuit recognized that "[t]he size of this award for a currently undeveloped tract may raise eyebrows," *id.* at 293, but noted that

> the landowner does not have to show an *imminent demand* for the sand from his property. He just has to show that there is a reasonable probability that the sand will be needed and wanted at a near enough point in the future to affect the current value of the property.

Id. at 294 (emphasis added) (footnote omitted); see also *id.* at 294 n.3 (noting that "how far in the future the sand will actually be mined" is unimportant). In arriving at the higher valuation figure, the court discounted the fact that the needs of sand buyers already were being met by existing sand mines. *Id.* at 294.

Similarly, the Federal Circuit held in *Yancey* v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990), that fair market value must account for "the property's *capacity to produce future income* if a reasonable buyer would consider

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Transp. v. *Lundberg*, 825 P.2d 641 (Ore.) (in banc) (sidewalk dedication ordinance), *cert. denied*, 113 S. Ct. 467 (1992); *Opinion of the Justices*, 555 A.2d 1095 (N.H. 1989) (public utilities).

that capacity in negotiating a fair price for the property." *Id.* at 1542 (emphasis added). Thus, the owners of turkeys that had been slaughtered as the result of a government quarantine could be compensated for the value of the turkeys as egg producers—which was the intended use of the turkeys—rather than the lower value of the turkeys themselves. *Id.*

In contrast to these cases, for example, the Fifth Circuit took a more narrow approach in affirming an award of $54,000 for a potential clam shell mining site, despite the landowner's claim that the property was worth between $266,000 and $889,075. *United States* v. *62.50 Acres of Land*, 953 F.2d 886, 888 (5th Cir. 1992). Noting that "regulatory contingencies associated with a potential use, like other sources of uncertainty, must be considered in determining just compensation due for expropriated property," *id.* at 890, the court rejected the shell mining proposal as too speculative because of the many federal and state permits required for mining. *Id.* at 891. Although the district court made no finding as to whether the permits would be necessary and unobtainable, the Fifth Circuit found it unlikely that the potential use as a shell mine would cause interested buyers to pay a significantly higher price for the property. *Id.* at 893.

A similarly restrictive approach was taken by the Sixth Circuit in *United States* v. *L.E. Cooke Co.*, 991 F.2d 336 (6th Cir. 1993). The court affirmed a $65,000 award for a parcel that, according to the landowner's expert, had an estimated value of $427,000 because of the land's potential use as a coal mine. Despite agreement among both parties' experts that coal existed in substantial quantities, the Sixth Circuit accepted the government's contention that mining was not economically feasible at that site. *Id.* at 340. The court reasoned that the highest and best use of the land is not reasonably probable if a substantial investment of capital is necessary. *Id.* at 341. Additionally, the fact that the landowner had never taken

any steps to establish a mining operation on the land was seen as significant. *Id.* at 343.

To be sure, the determination of just compensation depends on the facts of a particular case, particularly when uncertainties surround the potential use of the property. Nevertheless, it is clear that lower courts diverge on the extent to which they will accept prospective uses of property as legitimate bases for compensation. Clearly, the Court of Appeal's decision is the most extreme in refusing to accept the impact of gambling on the market even though there was no contrary evidence. Federal and state courts, therefore, require greater guidance as to the proper standards to apply when evaluating conflicting appraisals that are based on conflicting dates of valuation. This case, by examining one element in the highest and best use determination, presents a vital opportunity to detail those standards. In so doing, the Court can reinvigorate its holding in *Kirby* by refusing to allow inconsistency in lower court decisions to undermine the bedrock principle that just compensation must reflect the fair market value of the property evaluated at the correct time and based on proper market assumptions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 28, 1994

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APPENDICES

APPENDIX A

COURT OF APPEAL OF LOUISIANA
FOURTH CIRCUIT

No. 93-CA-0755

THE BOARD OF COMMISSIONERS OF THE
NEW ORLEANS EXHIBITION HALL AUTHORITY

v.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*

Sept. 22, 1993

Writ Granted Sept. 27, 1993

Stay Order Recalled; Writ Denied Oct. 15, 1993

Order Granting Rehearing to Clarify
Prior Order Nov. 18, 1993

Before KLEES, ARMSTRONG and WALTZER, JJ.

KLEES, Judge.

This is an expropriation suit filed by the Board of Commissioners of the New Orleans Exhibition Hall Authority ("NOEHA") against Missouri Pacific Railroad Company and Upland Industries Corporation (collectively referred to as "MOPAC") and New Orleans 2000 Partnership ("N.O. 2000") to acquire a 22.85 acre tract of land located immediately adjacent to Phase II of the New Orleans Convention Center on the Mississippi River.

NOEHA, a political subdivision of the State of Louisiana, was organized to plan, build and operate the New Orleans Convention Center. NOEHA's functions are implemented through its Board of Commissioners ("The Board"). Construction of Phase I of the NOCC began in 1985 and due to its success, construction on Phase II was begun shortly thereafter. Phases I and II of the NOCC are located on the Mississippi River and span from Julia Street upriver to Callipoe Street. Because of the apparent need for a larger exhibition facility, the Board began to plan the Phase III expansion in 1988. Pursuant to this plan, the Board and the City of New Orleans began negotiations with MOPAC to purchase part of a 72 acre tract of land located upriver from the NOCC. Negotiations with MOPAC reached a virtual impasse because MOPAC wanted to sell the entire 72 acre tract while NOEHA was only interested in purchasing the 22.85 acres necessary for the expansion.

In 1991, while NOEHA was still attempting to buy the property, Mr. Joe Canizaro of N.O. 2000 began negotiations with MOPAC to purchase the entire 72 acres. Their negotiations resulted in a buy-sell agreement signed on July 11, 1991 giving N.O. 2000 the right to buy the entire tract for $11,000,000. Before N.O. 2000 and MOPAC closed the sale, NOEHA made a final offer on September 6, 1991 to buy 22.85 acres of the land for $5,500,000, which was not accepted. On September 10, 1991, NOEHA filed the present action for expropriation pursuant to La.Rev.Stat. 19:2 *et seq.*

On September 11, 1991, the day after filing, MOPAC sold the entire 72 acre tract to N.O. 2000 for $11,000,000. Thereafter, NOEHA amended its petition adding N.O. 2000 as a party defendant. At trial, NOEHA maintained that it needs the 22.85 acres for the Phase III expansion of the NOCC and to provide an area for truck marshalling activities associated with the NOCC. N.O. 2000 argued that NOEHA failed to show a public need and purpose for the taking. Judgment expropriating the 22.85 acres

requested by NOEHA was entered on July 8, 1992, wherein the trial court found that NOEHA had met all statutory prerequisites to its expropriation suit and additionally had met its burden of proving that the property was for a public necessity. In December of 1992, a trial was held to determine compensation, and the jury awarded $13,000,000 to N.O. 2000.

NOEHA appealed and pleads a reduction of the $13,000,000 award. N.O. 2000 answered and filed a cross-appeal seeking reversal of the judgment of expropriation and, in the alternative, a judgment increasing its compensation award. We will discuss the expropriation and compensation trials separately.

I. *Expropriation*

The issue before the court was whether NOEHA, as the expropriating authority, had met its burden of establishing a public necessity and public purpose for the taking. Louisiana law establishes that the state or its political subdivisions may expropriate needed property where the state and owner cannot agree upon a price. La.R.S. 19:2(1). However, this right is limited by the Louisiana constitution which provides that ". . . property shall not be taken or damaged by the state or its subdivisions except for public purpose and with just compensation paid to the owner or unto the court for his benefit." La.Const. Art. I, Sec. 4 (1974).

In the instant case, the expediency of the expropriation is a matter for judicial determination; however, the suitability of the property sought to be expropriated for the purpose is primarily a question of fact on which the judgment of the trial court will not be disturbed unless manifestly erroneous. *See City of Westwego v. Marrero Land & Imp. Association*, 221 La. 564, 59 So.2d 885 (1952). In our view of the trial court's judgment of expropriation, we first consider the alleged errors of law raised by N.O. 2000 in its appeal.

N.O. 2000 contends that the trial court erred in: (1) failing to dismiss NOEHA's suit on the grounds that NOEHA had failed to comply with the mandatory statutory prerequisites to expropriation imposed by La.R.S. 19:2 *et seq.*; and (2) concluding, contrary to the weight of the evidence and applicable law, that NOEHA had established a public need for the entire 22.85 acre tract at this particular site.

A. *Statutory Prerequisites to Expropriation*

N.O. 2000 argues that the following procedural and statutory defects render NOEHA's expropriation suit void: (1) NOEHA failed to conduct bona fide negotiations prior to filing suit; (2) NOEHA misstated the method of appraisal used to value the property; (3) NOEHA's appraisals were not completed timely; (4) NOEHA's president did not have the requisite Board approval to file suit; and, (5) NOEHA failed to make an unconditional offer to purchase the property at issue.

NOEHA refutes these allegations by establishing its compliance with each of the statutory requirements prior to filing the petition for expropriation. La.R.S. 19:2.2 provides that before exercising its right of expropriation, the state or its political subdivisions must provide the owner with certain information from its appraisal as to the amount of compensation due. The required information includes the name, address, and qualifications of the appraisers, the amount of the appraisals, and a description of the methodology used in the appraisal. Additionally, the state must offer to compensate the owner in an amount equal to at least the lowest appraisal.

The record clearly supports NOEHA's position that it complied with the legal prerequisites to filing a petition for expropriation. The record shows that negotiations between MOPAC and NOEHA although unsuccessful, were ongoing, and NOEHA had sufficient funding to conduct these negotiations in good faith. Additionally, NOEHA's

offer to purchase the necessary portion of the 72 acres was based upon valid appraisals, and finally, the record indicates that NOEHA's Board had authorized its president to take the necessary actions to acquire the site in two separate resolutions. Accordingly, we find that the trial court properly maintained NOEHA's suit.

B. *Public need for Expansion of the Exhibition Facility and for Truck Marshalling*

N.O. 2000 argues that the trial court erred in determining that there was a public need for the expansion of the convention center on a 12 acre upriver site or, in the alternative, in determining a public need for more than 8 acres for the expansion. N.O. 2000 also argues that the trial court erred in allowing 10 acres for truck marshalling. At issue is whether expropriation of the MOPAC property is necessary.

In order to expropriate property, an expropriating authority must prove necessity for the expropriation. *City of Westwego v. Marrero Land & Improvement Assoc.*, 59 So.2d 885 (La.1952); *Parish of Jefferson v. Marsh Investment Corp.*, 398 So.2d 27 (La. App. 4th Cir.), *writ denied*, 401 So.2d 994 (La.1981). Once public necessity is established, the extent and the location of property to be expropriated are within the sound discretion of the expropriation authority, and the determination of same will not be disturbed by the courts if made in good faith. *Parish of Iberia v. Cook*, 238 La. 697, 116 So.2d 491 (1959); *Parish of Jefferson v. Marsh Investment Corp.*, *supra*, at 27. We first address the necessity of taking 12 acres for expanding the exhibition facility, and then address the necessity of taking 10 acres for truck marshalling.

1. *Exhibition Facility Expansion*

NOEHA established that in order to fulfill its public purpose of promoting economic growth and development of the area, it is necessary to further expand the conven-

tion center. This determination was based upon numerous studies done in relation to the Phase III expansion. The information gathered included the expert opinion of Mr. Edward McNeill, Executive Vice President of the Greater New Orleans Tourist and Convention Commission, the economic reports of Dr. Ryan, a University of New Orleans economist, the plans and information from the architectural firms of Billes/Manning and Perez/Ernst, and the studies performed by Coopers and Lybrand.

Since 1986, Dr. Ryan has performed annual economic impact studies of the convention center, which demonstrate the consistent beneficial impact of the convention center by creating new jobs and aiding the economy.

Mr. McNeill, an expert in convention and trade show marketing, evaluated the need for the expansion and opined that the expansion, which should enlarge the convention center to an excess of 1,000,000 square feet in exhibition space was necessary to promote economic growth. Mr. McNeill based his opinion upon his calculation that there would be a negative economic impact of $155,637,693 in losses if Phase III was not built. (This figure was based upon the loss of 30 conventions already scheduled for Phase III and only includes lost delegate spending, not exhibitor and secondary spending.) Mr. McNeill's conclusions and findings are further supported by the Coopers & Lybrand reports which recommend that NOEHA's option was to construct the Phase III expansion upriver on the MOPAC property.

Once NOEHA had established that expansion was necessary, the Board employed the architectural firms of Billes/Manning and Perez/Ernst to submit plans for the expansion. The Board selected a linear configuration extending upriver directly under the Greater New Orleans Bridge on the MOPAC property. This configuration was selected because it would be consistent with Phase I and Phase II and it would allow an expansion of over 1,000,000 square feet.

In response, N.O. 2000 claims that an upriver expansion of over 1,000,000 square feet is unwarranted and that a smaller site would sufficiently fulfill NOEHA's needs. N.O. 2000 asserts that no more than 8 acres of its property should be expropriated for the expansion or alternatively, NOEHA should expand downriver on the International River Center parking lot located in front of the Riverwalk.

The record supports the trial court's determination that there is a public need and purpose for the Phase III expansion. Once the necessity is determined, the extent of the property to be expropriated and the location falls within the sound discretion of NOEHA, and the determination of same will not be interfered with by the courts if made in good faith. *Parish of Iberia v. Cook*, 116 So.2d at 493. We find no evidence of bad faith in the instant case.

2. *Truck Marshalling*

N.O. 2000 asserts two general arguments in opposition to the expropriation of 10.85 acres for truck marshalling: (1) an alternative location should be selected for truck marshalling, and; (2) NOEHA no longer needs the full 10.85 acres because NOEHA acquired the right to use 6.2 acres for truck marshalling in the interim between the filing of its petition and the judgment of expropriation.[1]

At trial NOEHA presented the testimony of Dr. Trail, President of NOEHA, and Mr. Fore, Executive Vice-President of NOEHA, that truck marshalling at the expansion site is an integral part of the convention center's operations. The record shows that the Phase III expan-

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[1] N.O. 2000 also argues that truck marshalling cannot be allowed because it conflicts with the Riverfront Strategic Policy Plan. However, because this policy plan was not yet adopted by the City Planning Commission at the time of trial, it did not have the effect of law.

sion will encompass the area where truck marshalling was conducted in the past. Since this area will no longer be available and the expansion will require an even larger area for truck marshalling, NOEHA argues that the 10.85 acres are warranted.

We agree with the trial court's findings that 10.85 acres are necessary for the convention center's needs, and that truck marshalling is an integral part of the convention center expansion. Although N.O. 2000's suggestion that another location would be equally effective may have merit, the law is that the extent of the property to be expropriated, and the location thereof, are within the sound discretion of NOEHA. In the absence of any evidence of bad faith on the part of NOEHA, we will not disturb the trial court's determination.

II. Compensation

The sole issue before the jury was the amount of compensation due N.O. 2000 for the 22.85 acre tract expropriated. Louisiana law requires that the property owner receive "just compensation." La.R.S. 19:2.1. Both the statutory law and the state constitution provide that the owner whose property is expropriated must be compensated "to the full extent of his loss." La.R.S. 19:9; La. Const. Art. I, § 4 (1974).

In the instant case, the jury's factual determination that the appropriate compensation is $13,000,000 may not be disturbed on appeal absent a finding of manifest error. *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La.1973). Prior to reviewing the ultimate verdict under the manifest error standard, however, we consider the various errors of law which each side contends were made by the trial judge in relation to the jury trial.

NOEHA contends that the trial judge erred in: (1) failing to instruct the jury that an owner who has purchased his property with knowledge of its pending expropriation is entitled to recover in compensation no more

than he paid for the property; (2) ruling before trial that the date of valuation of the property for compensation purposes is the date of trial rather than the date the expropriation suit was filed; (3) failing to exclude as speculative certain testimony of N.O. 2000's experts regarding the "highest and best use" of the property, and giving erroneous jury instructions on the concept of "highest and best use"; and (4) failing to allow NOEHA to present sufficient rebuttal evidence as to the value of the property on the date of trial. In addition to refuting these arguments by NOEHA, N.O. 2000 contends that the trial judge erred in: (1) failing to grant N.O. 2000 a judgment n.o.v. on the basis that NOEHA introduced no competent evidence concerning the value of the property on the trial date; and (2) failing to award attorney's fees. We address these each [sic] issue in turn.

A. *Purchasing Land with Knowledge of Pending Expropriation*

NOEHA strongly urges that the trial judge erred in failing to instruct the jury that one who buys property which he knows will be expropriated cannot, as a matter of law, receive anymore in compensation than what he paid for the land. In the instant case, there is no question that the N.O. 2000 partners knew when they purchased the 72 acre tract for $11,000,000 that NOEHA wanted part of the land for the expansion of the convention center; in fact, the sale to N.O. 2000 was not finalized until the day after the expropriation suit was filed. At issue is whether this knowledge should bar N.O. 2000 from receiving compensation in an amount greater than whatever proportion of the eleven million dollar purchase price is attributable to the 22.85 acres expropriated.

NOEHA's argument is based upon *State Through Dept. of Highways v. Vermilion*, 258 La. 1159, 249 So.2d 167 (1971), whether the Louisiana Supreme Court reviewed an expropriation proceeding under the "quick taking"

statute[2] (as opposed to a regular expropriation governed by R.S. 19:1 *et seq.* as in the instant case). In *Vermilion*, the state claimed that a landowner/developer who had built (and then sold) five houses on his property after he knew it would probably be expropriated for the extension of Interstate 10 was not entitled to be compensated for these improvements at any more than their salvage value. The trial court awarded the fair market value of the houses, and the court of appeal reversed, awarding only the salvage value because of the landowner's "bad faith." The Supreme Court found that the state had failed to prove bad faith on the part of the landowner, and reversed the court of appeal. The following dicta from *Vermilion* is relied upon by the NOEHA as establishing a rule of law:

> The Court of Appeal announces as the rule of law:
>
> "A landowner who buys land or makes improvements within an area he knows will be required for a public improvement is entitled to be compensated for the land at an amount no greater than he paid and to be compensated for the improvement at an amount no greater than the salvage value of the improvements. *State Through Dept. of Highways v. Laird*, 219 La. 567, 53 So.2d 674, 676 (1951); 29A C.J.S. Eminent Domain § 294, 27 Am.Jur.2d 105, 6." *State Through Department of Highways v. Patout et al.*, 236 So.2d 40, 48 (1970).
>
> It is difficult to visualize how the rule announced by the Court of Appeal could have applied in Louisiana in an expropriation under the "quick taking" statute. Conceivably, it might apply if it were proved that the landowner, by surreptitious means, pene-

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[2] La.R.S. 48:441 *et seq.* allows the state to expropriate property in an expedited procedure in which the estimated compensation to the owner is deposited in the registry of the court before the trial is held.

> trated the curtain of secrecy which surrounds decisions made in the State Department of Highways and obtained advance information concerning the final location of a highway improvement. Such a situation could only arise in cases akin to the fraudulent acquisition of information. Such is not the case before us.

249 So.2d at 171. The *Vermilion* Court goes on to distinguish the *Laird* case and the encyclopedia article cited by the court of appeal as not being representative of the principle of law announced by the appellate court.[3] The Court specifically leaves unanswered the question of whether such a principle might apply in a regular expropriation procedure under R.S. 19:1 *et seq.*, wherein the change of ownership does not occur until after a trial is held and the expropriating authority pays compensation to the landowner. *Id.* at 172. The *Vermilion* Court concludes by noting that "[w]hatever the standard, . . . it must comply with the requirements of the [state] Constitution . . . .", which at the time provided for "just and adequate compensation" to be paid to the property owner.[4] *Id.* at 173.

We have found no case in Louisiana, either before or since *Vermilion*, in which the court has faced the issue of whether a landowner who buys property knowing it will be required for a public purpose is thereby barred from receiving at the time of the expropriation more than

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[3] The quote originally comes from the court of appeal decision in *State v. Patout*, 236 So.2d 40, 48 (La.App. 3d Cir.1970), a companion case to *Vermilion*, which was also reversed by the Supreme Court, 249 So.2d 179 (La.1971).

[4] Article 1 § 2 of the Louisiana Constitution (prior to its amendment in 1974) provided:

> Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid.

The changes made on this subject in the 1974 Constitution are discussed at page 11, *infra*.

he originally paid for the property. With one exception, all the cases cited to us deal with compensation for improvements that were placed upon the property after the owner found out about its pending expropriation. In *State v. Laird*, 219 La. 567, 53 So.2d 674 (1951), the case distinguished by the *Vermilion* Court, the landowner was denied compensation for a new garage he built after he had been notified of the institution of expropriation proceedings on his property. *Id.* at 676. *In Dixie Electric Membership Corp. v. Sibley*, 280 So.2d 311 (La. App. 1st Cir.1973), the court denied a landowner compensation for the removal of a house which he had deliberately moved onto his property after he was informed that expropriation would occur. The court interpreted the landowner's positioning of the house, which was located "directly within the pathway of the [proposed] transmission line" instead of "advantageously near the road," as being evidence of the landowner's bad faith. *Id.* at 314. Finally, in *Orleans Parish School Board v. Montegut*, 255 So.2d 613 (La.App. 4th Cir.1971), this court affirmed the trial court's ruling awarding a landowner additional compensation for the costs of an apartment building he had begun constructing on his property five months before it was expropriated. The expropriating authority had argued that the landowner's knowledge of the potential expropriation should have kept him from starting the apartment building. We rejected this argument, stating:

> Preliminarily plaintiff argues that since defendant knew plaintiff was considering expropriating either the square involved or an adjacent one, defendant should not have incurred most of the expenses involved. The error in this view is that it would expropriate property without compensation, pending a determination of whether or not to expropriate. *As long as the owner's actions in the face of possible expropriation are "neither unreasonable, fraudulent nor predatory" his improvements are compensable:*

State through Dept. of Hwys. v. Vermilion Develop. Co., 258 La. 1159, 249 So.2d 167 (1971).

Id. at 615 (emphasis added).

The most recent case to consider the affect of the landowner's knowledge on his compensation rights is *Hospital Service District No. 1 v. Guillot,* 482 So.2d 765 (La.App. 5th Cir.1986), in which the court denied compensation to a party, not the landowner, who had executed options to purchase certain property knowing that the property would probably be expropriated for a hospital. Under the facts presented, the court found that the option-holder was in bad faith because he "knew of the coming expropriation and his options were apparent attempts at setting artificially high prices." *Id.* at 771.

Taken as a whole, we do not find that the *Vermilion* case and the ensuing jurisprudence establish any rule of law with regard to the compensation owed a landowner who buys property with knowledge of its pending expropriation. We have found no case in Louisiana which directly confronts this issue. Although there is a line of cases denying compensation for improvements built in "bad faith", the term "bad faith" is not clearly defined. However, certain cases, such as our decision in *Orleans Parish School Board v. Montegut,* and the Supreme Court's decision in *Vermilion,* make it clear that "bad faith" must be more than mere knowledge of a pending expropriation. In the instant case, although the final sale to N.O. 2000 did not occur until after the expropriation suit was filed, the purchase agreement had been signed three months before. Moreover, while the evidence shows that Mr. Cannizaro intended to make money on his purchase, it shows nothing akin to fraudulent or predatory behavior on his part. Under these circumstances, the trial judge did not err in declining to give the jury instruction requested by NOEHA.

B. *Date of valuation*

In an expropriation suit, the value of the property must be established as of a certain date. In the instant case, the date of valuation is crucial because N.O. 2000 contends that the property significantly increased in value between the date the expropriation suit was filed (September 10, 1991) and the date of trial (December 18, 1992), due to the state legislature's approval of riverboat and land-based casino gambling during this period. Accordingly, NOEHA filed a pretrial Motion in Limine which sought to limit the evidence of value to the date on which the expropriation suit was filed. N.O. 2000 responded by filing a Motion for Partial Summary Judgment which sought a ruling that the date of valuation for purposes of determining compensation was to be either the date of trial or alternatively, the date of payment for the property, whichever was later. One month prior to trial, the trial judge, without giving written reasons, denied NOEHA's motion and granted the motion of N.O. 2000. NOEHA filed an application for writs in this court, which we denied on the basis that relator had an adequate remedy on appeal. At the trial on compensation, the trial judge instructed the jury to determine the fair market value of the property "as of the end of this trial today."

NOEHA now reasserts its argument that the trial judge erred in refusing to recognize the date of filing as the proper date of valuation. After reviewing the law, we find that the trial judge did not err.

NOEHA correctly asserts that all the relevant Louisiana jurisprudence holds that the measure of value of property expropriated for public use is the market value of the property as the date of the institution of suit. See *State v. Landry,* 219 La. 721, 53 So.2d 908, 910 (1951); *La. Ry. and Nav. Co. v. Baton Rouge Brickyard,* 136 La. 833, 838, 67 So. 922, 924 (1915). However, the Louisiana cases have merely restated a principle first established in the early 1900's. None of these cases has addressed

the issue we face in the instant case, which is whether the landowner may be constitutionally deprived of an increase in the value of his property which occurs after the expropriation suit is filed but before he receives payment for the property.

The U.S. Supreme Court addressed this issue in *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), a federal condemnation suit. In that case, the Court first held that, in a "straight condemnation procedure" (one, as here, where suit is filed and the amount of compensation is judicially determined prior to the government's paying for or taking title to the land), the taking occurs on the date the government tenders payment for the property rather than on the date the condemnation suit is filed. 467 U.S. at 15, 104 S.Ct. at 2197. Moreover, the landowner is constitutionally entitled to the fair market value of his property on the date of the taking. *Id.*, 467 U.S. at 15 at 2197 [sic]. Therefore, according to the Court, while the date of trial may be used as a convenience, "if the result of that approach is to provide the owner substantially less than the fair market value of his property on the date the United States tenders payment, it violates the Fifth Amendment." *Id.*, 467 U.S. at 17 at 2198 [sic]. The Court went on to say that in order to satisfy the constitutional requirements, there must be a procedure for modifying a condemnation award (upon motion of the landowner) when there has been a substantial delay between the date of valuation and the date the judgment is paid, during which time the value of the land has changed materially. *Id.* 467 U.S. at 17 at 2198 [sic].

Although *Kirby* is a federal condemnation procedure there is no question that the Fifth Amendment also applies to the states. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 n. 7, 104 S.Ct. 2321, 2331 n. 7, 81 L.Ed.2d 186 (1984); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160, 101 S.Ct. 446, 450, 66 L.Ed.2d 358 (1980). Therefore, although this issue has not been addressed in Louisiana, we conclude based upon

Kirby that it would be unconstitutional for the court to set the date of filing as the date of valuation in a regular expropriation proceeding in which the property owner is claiming, as here, that the property has significantly increased in value since the date of filing.

Furthermore, we also find that to value the property on the date of filing under the facts of this case would be a violation of individual property rights under Article I, Section 4 of the Louisiana Constitution of 1974. In 1974, the language of the expropriation clause in the 1921 state constitution giving the landowner the right to "just and adequate compensation" was expanded. This section now includes a provision stating that property shall not be taken without "just compensation" paid to its owner, plus an additional sentence: "In every expropriation, a party has the right to trial by jury to determine compensation, and *the owner shall be compensated to the full extent of his loss.*" La. Const. art. I, § 4 (1974, amended 1989) (Emphasis added). Interpreting this provision, the Louisiana Supreme Court noted that "the new constitutional language 'has broadened the measure of damages in expropriation cases by requiring that an owner not only be paid the market value of property taken and severance damages to his remainder, but also that such an owner be put in as good a position pecuniarily as he would have been had his property not been taken.' " *State Through Dept. of Highways v. Constant,* 369 So.2d 699, 701 (La. 1979) (quoting the majority opinion from the court of appeal, *State, Through Dept. of Highways v. Constant,* 359 So.2d 666, 671 (La.App. 1st Cir.1978)). Since *Constant,* appellant courts have relied on this principle to grant compensation for damages incidental to the taking, such as replacement costs of improvements and business losses. See Comment, *Compensating an Owner to the Full Extent of His Loss: A Reevaluation of Compensable Damages in Louisiana Expropriation Cases,* 51 La.L.Rev. 821, 830-835 (1991).

Although Louisiana decisions have repeatedly assumed, even since the constitutional changes, that the date

of taking or date of valuation is the date of filing suit,[5] none of these cases has involved a fact situation such as the instant one; nor has any Louisiana court had occasion to examine the constitutionality of such a rule when applied to this fact situation. In doing so, we hold that under the Louisiana constitution as well as the dictates of *Kirby,* no actual taking (meaning a transfer of the rights to possession and ownership) can occur until compensation has been paid either to the property owner, or into the registry of the court. See R.S. 19:10, *State, Dept. of Trans. & Development v. Sugarland Ventures, Inc.,* 476 So.2d 970 (La.App. 1st Cir.), *writ denied,* 478 So.2d 909 (La.1985).[6] Furthermore, both the Louisiana constitution and Fifth Amendment to the United States constitution demand that, if the property has increased (or decreased) in value between the time the expropriation suit was filed and the time of the taking, the property owner is entitled to receive the fair market value of the property at the time of the taking. This right of the property owner completely correlates with the right of the expropriating authority, at any time up until the time of actual payment, even after the rendition of a final judgment in a regular expropriation procedure, to abandon the public purpose behind the expropriation and decline to pay the judgment. See, *State, Dept. of Trans. & Development v. Sugarland Ventures, Inc., supra,* at 974-975.

Accordingly, we conclude that the trial judge did not err in granting the motion of N.O. 2000, nor in instructing the jury to determine the value of the property as of the date of trial.

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[5] *See, e.g., City of New Orleans v. Giraud,* 346 So.2d 1113, 1118 (La.App. 4th Cir.), *writ denied, City of New Orleans v. Wiener,* 349 So.2d 884 (La.1977) and *Giraud v. City of New Orleans,* 362 So.2d 579 (La.1978), and cases cited therein.

[6] See also R.S. 48:441 *et seq.* Payment into the registry of the court is the norm in "quick-taking" cases, which procedure has been held to be constitutional. See *State, Dept. of Highways v. Olinkraft,* 350 So.2d 865 (La.1977).

C. *Evidence of Value*

NOEHA claims that trial court erred by allowing speculative testimony regarding N.O. 2000's future development plans to prove the highest and best use of the property; NOEHA also contends that the trial judge gave improper jury instructions on the concept of highest and best use. Much of NOEHA's argument in this regard is based upon its assertion that the proper date of valuation of the property is September 10, 1991, and its resulting attempts before and during trial to block any evidence of value beyond that date. Our holding that the date of trial was a proper date of valuation implicitly negates this aspect of NOEHA's argument. Moreover, we do not find that the evidence complained of was too speculative to be admissible or that the jury instructions were improper.

The law is that a landowner is entitled to the market value of his property at the time of the expropriation, considered in light of its highest and best use. *Board of Commissioners v. Acosta,* 562 So.2d 15, 17 (La.App. 4th Cir.1990). Highest and best use is the most favorable employment to which the land is adaptable and to which the property may be put in the not too distant future. *Id.* All the experts who testified agreed that highest and best use must meet four criteria: (1) physically possible; (2) legally permissible; (3) financially feasible; and (4) maximally productive. All the experts used the comparable sales method to determine value.

Three appraisers who testified for NOEHA opined that the highest and best use of the property in question was to hold for future development. Their independent estimates of the value of the property as of September 10, 1991 were as follows: Mr. Jimmy Thorns, Jr.: $5,534,530; Mr. Robert Merrick: $5,525,000; and Mr. Charles Seymour: $5,250,000. Mr. Thorns also testified that in his opinion, the value of the property had not changed significantly between September 1991 and the date of trial.

John Beckman, an expert in urban planning who testified for N.A. 2000, opined that the highest and best use of the property was a non-industrial multi-use development (hotels, office buildings and high rise residential) based partially upon development plans submitted by N.O. 2000. Two appraisers testifying for N.O. 2000, Mr. Peter Bowes and Ms. Jean Felts, each compiled an estimate of value based upon this mixed use, which they agreed was the highest and best use of the property. Both opined that the market perceptions concerning the prospect of riverboat and casino gambling in this area had significantly increased the fair market value of the property. Both also considered N.O. 2000's development plans in their studies. Their estimates of value as of the date of trial were $28,400,000 (Mr. Bowes) and $32,360,730 (Ms. Felts).

NOEHA's contention that the testimony of N.O. 2000's experts should have been excluded as speculative is based primarily upon NOEHA's assertion that there was no definitive proof that this type of development could take place in the "not too distant future." Because the term "not too distant future" has no exact definition (although one expert opined it would be within two years), we find that its meaning is a factual determination to be made by the jury. The jury had the responsibility of assessing the credibility of and weighing the testimony of the experts with regard to highest and best use, which is ultimately a question of fact. See: *Boem v. Bienemy*, 508 So.2d 159, 162 (La.App. 4th Cir.1987); *Faustina Pipe Line Co. v. Hebert*, 469 So.2d 483, 487 (La.App. 3d Cir.1985). The trial judge did not err in admitting this testimony.

NOEHA also contends that the jury instructions concerning highest and best use were improper and at best, confusing, because the trial judge used several terms interchangeably with "not too distant future." The law is that the jury charges as a whole must fairly apprise the jury of the applicable law. If they do so, the appellate

court will not reverse merely because the trial court refused to give all the charges requested or to use the specific language sought by a party. Reversal is warranted only when there is manifest error such as to preclude the jury from reaching a verdict based on the law and the facts. *Barnett v. New Orleans Public Service, Inc.*, 489 So.2d 452, 454-55 (La.App. 4th Cir.1986).

We find no such manifest error created by the jury charges in the instant case. In explaining highest and best use, the trial judge began by stating three times consecutively that the term meant a use to which the property could be put in the "not too distant future." He then repeated the term "not too distant future" twice more later in his instructions. Under these circumstances, we do not find that the substitution of other similar terms, such as "reasonably near future" (used once) and "reasonably foreseable future" (also used once) or even the single reference to "in the future" would have confused the jury to the point that they did not adequately understand the law. We therefore hold that the trial judge did not err manifestly in his instructions to the jury.

D. *Rebuttal Evidence*

NOEHA also argues that the trial judge erred in refusing to allow sufficient rebuttal testimony by its expert, Mr. Thorns. During its case in chief, NOEHA presented expert testimony as to the value of the property in September 1991, when the suit was instituted. On rebuttal, Mr. Thorns testified that he had updated his original appraisal to reflect his estimate of the property's value as of the date of trial. The trial court allowed Mr. Thorns to testify as to his opinion that the property had the same value of the date of trial that it did on September 10, 1991. However, the judge refused to allow him to elaborate as to the comparable sales upon which he had based his opinion or to testify about his opinion of the methods used by N.O. 2000's appraisers. The trial judge indicated

that he believed this testimony to be cumulative and outside the parameters of proper rebuttal. For its part, N.O. 2000 argued at trial and continues to argue that Mr. Thorns should not have been allowed to testify at all on the issue of value as of the date of trial because NOEHA knew from the outset that the date of trial was the determinative date, and therefore should have presented this testimony as part of its case in chief rather than as rebuttal.

The admission of rebuttal evidence is largely within the discretion of the trial judge. *CNG Producing Co. v. Sooner Pipe & Supply Co.*, 483 So.2d 1215, 1219 (La.App. 4th Cir.), *writ denied*, 488 So.2d 692 (La.1986). Although NOEHA clearly had the right to present some evidence in rebuttal to the testimony of experts for N.O. 2000, we do not find that the trial judge abused his discretion in limiting the scope of that evidence as he did. Accordingly, NOEHA's argument is without merit.

E. *Motion for Judgment Notwithstanding the Verdict*

N.O. 2000 contends on appeal that the trial court should have granted its motion for judgment n.o.v. setting the value of the property at $28,300,000. The motion was based upon N.O. 2000's assertion that NOEHA had failed to introduce any competent evidence as to the value of the property on the date of trial, which the trial judge had ruled was the appropriate date. Therefore, according to N.O. 2000, the value could be no less than the lowest estimate of its appraisers.

N.O. 2000's argument fails for two reasons. First, its success depends upon the assertion that Mr. Thorns' rebuttal testimony on value should have been excluded, which assertion we have already rejected. We do not believe, as N.O. 2000 suggests, that the law prohibits the expropriating authority from presenting any rebuttal at all in a Title 19 expropriation suit. In this instance, Mr. Thorns' rebuttal testimony was sufficient to create a ques-

tion of fact for the jury as to value. Secondly, even without this rebuttal testimony, the jury could have reasonably arrived at a value lower than N.O. 2000's lowest estimate by comparing the methods of valuation and the comparables used by NOEHA's experts in its case in chief with those used by N.O. 2000's experts, even though each set of experts used a different date of valuation. We therefore used a different date of valuation. We therefore find no grounds for a judgment n.o.v. The trial court properly denied this motion.

Conclusion

Having disposed of the legal arguments made by the parties (with the exception of the award of attorney's fees, which is discussed below), we had to examine the record to determine whether, based on the evidence presented, the jury's factual determination of $13,000,000 as the appropriate compensation was reasonable. After having so examined the record, we do not find the jury's verdict to be unreasonable or manifestly erroneous. There was a tremendous amount of competent but conflicting evidence presented to the jury. Viewing the evidence as a whole, the jury could have reasonably found that the property was worth more than N.O. 2000 paid for it in September of 1991, but less than the estimates of N.O. 2000's experts. Therefore, we affirm the judgment.

Attorney's Fees

N.O. 2000 urges that the trial court erred in failing to consider the amount of attorney's fees owed to it by NOEHA and to award those as part of N.O. 2000's compensation.

La.R.S. 19:8 provides, in pertinent part:

> Immediately after compensation has been determined, the plaintiff shall, upon motion of the defendant, present evidence as to the highest amount it offered the defendant for the property prior to trial

> on the merits. After hearing evidence on the issue, the court shall determine the highest amount offered. If the highest amount offered is less than the compensation awarded, the court may award reasonable attorney fees.

We have held that, where the statutory offer referred to in La.R.S. 19:2.2 is substantially higher than the value as determined by the jury, the trial court should order that the owner be compensated for the attorney's fees it incurred in defending itself in the expropriation action. *City of New Orleans v. Condon,* 600 So.2d 78, 81 (La. App. 4th Cir.), *writ denied,* 605, So.2d 1130 (La.1992). We have also held that, in such cases, the land owner "is entitled to" attorney's fees as part of the compensation "to the full extent of his loss" which is mandated by the constitution. *Consolidated Sewerage District of the City of Kenner v. Schultin,* 387 So.2d 1369, 1372-73 (La.App. 4th Cir.1980); *Gravolet v. Board of Commissioners,* 598 So.2d 1231, 1236 (La.App. 4th Cir.1992).

In the instant case, as the statutory offer (presumably 5.5 million dollars) was substantially lower than the 13 million dollar jury verdict, the trial judge was obligated to assess attorney's fees. He apparently intended to do so in a separate proceeding, as he attempted to reserve the right to determine attorney's fees in both the judgment on public necessity for expropriation and the judgment on compensation. Because we do not have the evidence before us upon which to base such a determination, we find it appropriate to remand the matter to the trial court for this purpose.

Accordingly, for the reasons given, the judgments of the trial court are affirmed and the matter is remanded to the trial court for the consideration and awarding of attorney's fees, in accordance with this opinion.

AFFIRMED AND REMANDED.

WALTZER, J., concurs in the results with written reasons.

WALTZER, Judge, concurring in the results.

I concur in the results reached, but would not rely on *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984) to do so. I find the results reached not manifestly erroneous under Louisiana state law, without resort to *Kirby.* I find that in accordance with longstanding Louisiana jurisprudence which was unchanged by the 1974 Constitution that the date of valuation is the date of taking which is the date of institution, *i.e.,* filing of suit because the final judgment once final relates back in time to the date of filing. Additionally, I find the amount awarded proper on another basis, even though the trial court erred in instructing the jury that the valuation date was the date of trial, and I would award interest from the date of judicial demand until paid.

Turning first to the *Kirby* issue, *Kirby* does not apply because it is a federal court case interpreting a specific federal statute when used by a federal officer as authorized by a specific act of Congress. The statute is specifically limited to appropriations by the federal government, not state, local or parish government and is specifically limited to federal appropriation cases filed in federal district court, not state court as in the instant case.

In *Kirby,* supra, the Supreme Court stated:

> *Title 40 U.S.C. § 257,* in conjunction with Rule 71A of the Federal Rules of Civil Procedure, prescribes a procedure pursuant to which *the United States* may appropriate privately owned land by eminent domain. The central issue in this case is whether the manner in which the value of the land is determined and paid to its owner *under that procedure* . . .

The United States customarily employs one of three methods when it appropriates private land for a public purpose. The most frequently used is the so-called *"straight-condemnation" procedure prescribed in 40 U.S.C. § 257.* Under that *statute, an "officer of the Government" who is "authorized to procure real estate for the erection of a public building or for other public uses" makes an application to the Attorney General who, within 30 days, must initiate condemnation proceedings . . . Rule 71A requires the filing in federal district court* of a *"complaint in condemnation,"* identifying the property and interest therein that the United States wishes to take, followed by a trial—before a jury, judge, or specially appointed commission—of the question of how much compensation is due the owner of the land. . . .

A more expeditious procedure is prescribed by *40 U.S.C. § 258a.* That statute empowers the Government, "at any time before judgment" in a condemnation suit, to file a *"declaration of taking signed by the authority empowered by law to acquire the lands [in question], declaring that said lands are thereby taken for the use of the United States."* The Government is obliged, at the time of the filing *to deposit* in the court, "to the use of the persons entitled thereto," an amount of money equal to the *estimated value of the land. Title and right to possession thereupon vest immediately to the United States.* In subsequent judicial proceedings, the exact value of the land (*on the date of declaration of taking was filed*) is determined, and the owner is awarded the difference (if any) between the adjudicated value of the land the amount already received by the owner, plus interest on that difference.

Finally, *Congress* occasionally exercises the power of eminent domain directly . . . it sometimes *enacts a statute appropriating the property immediately by*

"legislative taking" and *setting up a special procedure* for ascertaining, after the appropriation, the compensation due to the owners.

In addition *to these three statutory methods,* the *United States* is capable of *acquiring privately owned land summarily, by physically entering into possession and ousting the owner. E.g., United States v. Dickinson,* 331 U.S. 745, 747-749, 67 S.Ct. 1382, 1384-1385, 91 L.Ed. 1789 (1947). In such a case the owner has a right to bring an "inverse condemnation" suit to recover *the value of the land on the date of the intrusion by the Government.* (citations omitted).

The Government's selection amongst . . . these various methods of acquiring property is governed, to some extent, by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et seq.* The statute enjoins federal agencies, *inter alia,* to attempt to acquire property by negotiation rather than condemnation, and whenever possible not to take land by physical appropriation §§ 4651(1), (4) (8). In addition, the statute requires a court with jurisdiction over a condemnation action that is *dismissed or abandoned* by the Government to award the landowner an amount that will reimburse him for *"his reasonable costs, disbursements, and expenses" incurred on contesting the suit.* § 4654(a).[7] [Footnote 7 provides: "We have held that the last-mentioned *provision for the reimbursement of costs* is a matter of legislative grace, *not constitutional entitlement, United States v. Bodcaw Co.,* 440 U.S. 202, 204, 99 S. Ct. 1066, 1067, 59 L.Ed.2d 257 (1979) (*per curiam*)."] The statute does not, however, regulate *decisions* by the Government whether to employ the "straight-condemnation" procedure prescribed in § 257 or the "declaration of taking" procedure embodied in § 258a.

Petitioner Kirby Forestry Industries, Inc. was a manufacturer of forest products and owned substantial tracts of timberland in Texas. The National Park Service decided to establish a 35,500 acre Big Thicket National Park in the area. The Texas Forestry Association, of which Kirby Forestry is a member, endorsed the proposal and declared a voluntary moratorium on logging in the designated area. From 1967 onward, Kirby voluntarily observed the moratorium and has not harvested the timber crop on its property lying within the area designated by the Park Service. In 1974, Congress rejected the Park Service Plan and enacted legislation creating a much bigger national park, the Big Thicket National Preserve. The statute, Act of Oct. 11, 1974, Pub.L. 93-439, 88 Stat. 1254, 16 U.S.C. *et seq.*, directs the Secretary of Interior to acquire the land. The Supreme Court further stated:

> The Senate Report made clear that, *though* the *Secretary had the authority to acquire* individual tracts *by declaration of taking, pursuant to 40 U.S.C. § 258a,* such a peremptory procedure should be employed *only when necessary to protect* a parcel *from destruction.* S.Rep. No. 93-875, p. 5 (1974) . . . in the absence of such an emergency, the Secretary would purchase the land using the straight-condemnation method prescribed in *40 U.S.C. § 257.*

The U.S. Government initially attempted a negotiated purchase. The negotiations broke down and on August 21, 1978, the United States filed a complaint in condemnation in the federal district court in Texas. A lis pendens was filed and the district court referred the case to a special commission to determine compensation. At trial before the commission, both parties *stipulated* "today is the date of taking." The commission recommended $2,331,202 compensation. Both parties objected to the commission's recommendation. The federal district court awarded compensation at the recommended amount of $2,331,202 plus 6% interest from the filing date *to the*

date the Government deposited an amount equal to the adjudicated value of the land with the court as provided for under 40 U.S.C. § 258a. 40 U.S.C. § 258a provided as follows at the time that *Kirby* was decided:

> In any proceeding in any *court of the United States* outside of the District of Columbia which has been or may be *instituted by* and in the *name of* and under the *authority of* the *United States* for the acquisition of any land or easement or right of way in land for the public use, the *petitioner may file* in the cause, with the petition or at any time before judgment, *a declaration of taking* signed *by the authority empowered by law to acquire* the lands described in the petition, declaring that said lands are thereby taken for the *use of the United States.* Said declaration of taking shall contain or have annexed thereto—
>
> (1) A statement of the authority under which and the public use for which said lands are taken.
>
> (2) A description of the lands taken sufficient for the identification thereof.
>
> (3) A statement of the estate or interest in said lands taken for said public use.
>
> (4) A plan showing the lands taken.
>
> (5) A *statement of* the sum of *money estimated by* said *acquiring authority to be just compensation* for the land taken.
>
> Upon the *filing (sic) said declaration of taking and* of the *deposit* in the court, to the use of the persons entitled thereto, *of the amount of the estimated compensation stated in said declaration, title* to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, *shall vest in the United States of America,* and said lands shall be deemed to be condemned and taken

for the use of the United States, and the *right to just compensation for the same shall vest in the persons entitled thereto;* and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said *judgment shall include,* as part of the just compensation awarded, *interest at the rate of 6 per centum per annum on the amount finally awarded* as the *value of the property as of the date of taking, from said date to the date of payment;* but *interest shall not be allowed on* so much thereof as shall have been *paid into the court.* No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

On March 26, 1982, the United States deposited the total amount of the judgment into the registry of the court, thus acquiring title under the statute. All parties appealed to the Fifth Circuit and then to the Supreme Court. The Supreme Court granted writs to resolve a conflict among the federal circuits. The Supreme Court noted that:

> The *United States* has the authority to take private property for public use by eminent domain (citation omitted), but is obliged by the Fifth Amendment to provide "just compensation" to the owner thereof. "Just compensation . . . means . . . the fair market value of the property on the date it is appropriated. (citation omitted) Under this standard, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking. (citation omitted) If *the Government* pays the owner before or at the time the property is taken, no interest is due on the award. (citation omitted) Such a mode of compensation is not constitutionally mandated; the Fifth Amendment does not forbid *the Government* to take land and pay for it later. (citation omitted) But if disbursement of the award is delayed, the owner is entitled to interest . . .

The Government contended that the date of *taking* was the date *payment* was *tendered* by the United States under the statute which states "Upon the *filing (sic) declaration of taking and* of the *deposit* in the court . . . *of the . . . compensation, title . . . shall vest in the United States . . .*" This argument was supported by the Supreme Court's prior statement in *Danforth v. United States,* 308 U.S. 271, 284, 60 S.Ct. 231, 236, 84 L.Ed.2d 240 (1939) that:

> [u]nless a taking has occurred previously in actuality or by a statutory provision . . ., we are of the view that the taking in a condemnation suit *under this statute* takes place upon the payment of the money awarded by the condemnor.

The Supreme Court further noted:

> In response to the contention that such a procedure was unfair, we observed, ' "[t]he owner is protected by the rule that *title* does not pass until compensation has been ascertained and paid . . ." '

Kirby argued that

> . . . the owner is effectively deprived of all of the significant interests associated with ownership long before the Government tenders payment. The filing of a complaint in condemnation and a notice of *lis pendens*, . . . has the effect of preventing the owner of unimproved land thereafter from making any profitable use of it, or of selling it to another private party. (At 2196).

Kirby differs from the instant case in that the Kirby land was raw forest land which may have had potential use as a subdivision due to the growth of the residential areas surrounding nearby Beaumont, Texas. The land in the instant case already has streets, curbing, drainage, sewer lines, utility lines, and street lights, although there are no permanent buildings thereon. Additionally, the land in the instant case was in fact sold to Cannizzaro and his investors by the owner Missouri Pacific Railroad Company after the expropriation suit was filed.

The court in *Kirby* further noted:

> If petitioner's depiction of the impairment of its beneficial interests during the pendency of the condemnation suit were accurate, we would find its constitutional argument compelling . . . However, we do not find, prior to the payment of the condemnation award in this case, an interference with petitioner's property interests severe enough to give rise to a taking under the foregoing theory. Until title passed to the United States, petitioner was free to make whatever use it pleased of its property. The Government never forbade petitioner to cut the trees . . . Nor did the Government abridge petitioner's right to sell the land if it wished. It is certainly possible . . . that the initiation of condemnation proceedings, publicized by the filing of a notice of *lis pendens*, reduced the price that the land would have fetched, but impairment of the market value of real property incident to other-

> wise legitimate government action ordinarily does not result in a taking. (citations omitted) At least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment. (At 2196-7).

Having resolved that issue, the *Kirby* court then stated:

> The foregoing conclusion does not dispose of this case. We still must determine whether the award itself satisfied the strictures of the Fifth Amendment. *. . . petitioner is constitutionally entitled to the fair market value of its property on the date of the taking.*

The difference between the instant case and the *Kirby* case boils down to a difference between federal appropriation and state expropriation law. Under the federal law, the date of filing of the case, also known as the date of institution of suit, can be a different day from the day of taking and a different day from the day of valuation and a different day from the day of judgment and a different day from the day of payment and a different day from the day title passes. Under state law all of these days will always be on the same day, namely the day the suit is filed, because our *final* judgment relates back in time to the day suit was filed which also becomes the day title passes and the day of taking. Thus it meets the constitutional requirement that "petitioner is constitutionally entitled to the fair market value of its property *on the date of the taking.*" Louisiana petitioners always receive fair market value on the date of the taking, because the valuation date, i.e date of filing of case, and the date of the taking, i.e. date of filing of case, are *always* the same. Additionally, under Louisiana law, interest is awarded from date of judicial demand, i.e. the day the case is filed, until paid. *Matter of Clark,* 960 F.2d 475 (5th Cir.1992).

The court in *Kirby* noted the practical problems of ascertaining fair market value and valuation date.

> . . . it is imperative that the trier of fact in a condemnation action be given a fixed date as of which the value of the land is to be assessed. At the time of trial, no one knows when the United States will exercise its option to purchase the property, so adoption of the date of payment as the date of valuation is *infeasible*. Moreover, prediction of the value of land at a future time is notoriously difficult. Under these circumstances, courts and commissions understandably have adopted *the convention* of using the date of the commencement of the trial as the date of the valuation.

The Supreme Court is correct in its statement that it is an absolute necessity that there be a specific fixed date on which valuation is made. One practical reason for this necessity is the lag time that it takes for an appraisal to be prepared. The highest professional designation of an appraiser is an M.A.I. or Member Appraisal Institute. The M.A.I. designation is awarded only after years of course study, field experience, and successful completion of many levels of tests. The Appraisal Institute was founded in 1933 as a result of the crash of 1929 which was due in part to the sale of assets without appraisals or with artificial values arbitrarily set. M.A.I.s appraise only in conformity with the formulas and standards of the Institute. According to M.A.I. standards, there are 4 methods of appraisals: the cost approach, the sales comparison approach, the income approach and the development approach. The cost approach is replacement or reproduction on cost of improvements new less depreciation plus on site improvement and land value. Depreciation consists of physically curable (deferred maintenance), physically incurable (effective age of the building divided by economic life) functional obsolescence (replacement cost does not exist), and external obsolescence (market rents have dropped, character of the neighborhood changed, market changes outside of the property itself). The sales comparison approach uses

comparable units of comparison (square feet, linear feet, apartment units, etc.) and elements of comparison (age, location, condition, size, land to building ratio, etc.) The development approach is the most complex. The development approach begins with a marketability or feasibility analysis in order to determine what is the supply and demand in the area or even if there is a supply or a demand in an area. The appraiser then asks what is the highest and best use of the property by examining the use of the property surrounding it. Then the appraiser uses a sales comparison approach to determine how many lots it can be subdivided into, sets the retail lot value including street length and width, cost per linear foot to install streets, drainage, etc., costs of subdivision, including costs of zoning changes, if necessary, etc. and projects a sell out calendar and sell out time per lot. In the development method, the question asked is how much is it worth to a developer who will survey, layout, subdivide, etc. with an expected rate of return. In each method of appraisal, the appraiser runs real estate transfers for the past year back from the date of valuation and plots on a plot plan what has been sold in the geographic neighborhood in order to obtain comparables. It is apparent that it takes the appraiser time to compile the information, run the math formulas and issue his appraisal value as of a specific date. The federal court's adoption of the convention of the date of trial as the valuation date insures that the appraisal does not have the benefit of the sales made on the day of trial which is also the day of valuation because his report must be completed before trial. Therefore there is always a hole in his information and an unaccounted for period of time. If the appraiser is testifying on the day of trial, he clearly cannot give an informed opinion as to the value as of that same day because the information will of necessity be incomplete. Even as he testifies a comparable sale may simultaneously be taking place which would have changed his value, had he but known. Louisiana law completely avoids the problems found in *Kirby*.

Turning to the instant case, this writer believes that the award of 13 million was not an abuse of discretion by the trier of fact. Missouri Pacific had agreed to a sale price of 12 million to the City, but the City backed out of the agreement. Later a firm price of 11 million was reached, but neither the City nor New Orleans Exhibition Hall Authority confected the sale, but rather continued attempting to lower the price. The City continued attempting to cut the price by seeking to purchase only certain specified acreage. Missouri Pacific wanted to sell the whole parcel. Eventually, Missouri Pacific sold the tract to Cannizzaro and his investors for 11 million after it turned down his 10 million offer for the entire tract. Negotiations revealed that there were environmental problems on the property stemming from its prior use. Estimates range from 1 million ot 5 million for the environmental cleanup. It appears to this writer that the jury awarded 11 million plus 2 million for environmental cleanup. The award is supported by the record and clearly not an abuse of discretion.

Finally I would note that under Louisiana law interest on the 13 million is due from the date of judicial demand until paid. I concur in remanding the issue of attorneys fees to the district court for a hearing.

ON REHEARING GRANTED

We grant NOEHA's application for rehearing for the limited purpose of clarifying our prior remand order. On rehearing, we remand the matter to the trial court for the purpose of determining and assessing attorney's fees, costs and any applicable interest. In all other respects the judgment remains unchanged.

APPENDIX B

SUPREME COURT OF LOUISIANA

No. 93-C-3088

THE BOARD OF COMMISSIONERS OF THE
NEW ORLEANS EXHIBITION HALL AUTHORITY

v.

MISSOURI PACIFIC RAILROAD COMPANY,
UPLAND INDUSTRIES CORPORATION, and
NEW ORLEANS 2000 PARTNERSHIP

Jan. 28, 1994

In re New Orleans 2000 Partnership;—Defendant(s); applying for writ of certiorari and/or review; Parish of Orleans, Civil District Court, Div. "J", No. 92-4155; to the Court of Appeal, Fourth Circuit, No. 93CA-0755.

Denied.

DENNIS, J., not on panel.

APPENDIX C

SUPREME COURT OF LOUISIANA

No. 93-C-3100

THE BOARD OF COMMISSIONERS OF
NEW ORLEANS EXHIBITION HALL AUTHORITY

v.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*

Jan. 28, 1994

In re New Orleans Exhibit Hall Auth;—Plaintiff(s); applying for writ of certiorari and/or review; to the Court of Appeal, Fourth Circuit, No. 93CA-0755; Parish of Orleans, Civil District Court, Div. "J", No. 92-04155.

Denied.

ORTIQUE, J., would grant. It is illogical and inappropriate to permit someone to gain a profit by taking advantage of a situation created by the Courts.

DENNIS, J., not on panel.

APPENDIX D

STATE OF LOUISIANA
CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

No. 92-3155 Division "J" Docket #5

THE BOARD OF COMMISSIONERS OF THE
NEW ORLEANS EXHIBITION HALL AUTHORITY

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
UPLAND INDUSTRIES CORPORATION, AND
NEW ORLEANS 2000 PARTNERSHIP

JUDGMENT

Considering the verdict of the Jury rendered herein.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of New Orleans 2000 Partnership and against the Board of Commissioners of the New Orleans Exhibition Hall Authority in the full sum of Thirteen Million (13,000,000) Dollars, reserving to the parties all of their rights in and as to Interest and Court costs, and Attorney Fees to be determined by way of contradictory hearing.

JUDGMENT READ AND RENDERED IN OPEN COURT DECEMBER 10, 1992

JUDGMENT READ AND SIGNED IN OPEN COURT DECEMBER 21, 1992

/s/ George C. Connolly, Jr.
Judge

Supreme Court, U.S.
FILED
JUN 3 1994
OFFICE OF THE CLERK

No. 93-1709

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NEW ORLEANS 2000 PARTNERSHIP,
Petitioner,

v.

BOARD OF COMMISSIONERS
OF THE NEW ORLEANS EXHIBITION HALL AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, of Louisiana

---

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cases — Page

Kirby Forest Indus., Inc. v. *United States*, 467 U.S. 1 (1984) 2
United States v. *69.1 Acres of Land*, 942 F.2d 290 (4th Cir. 1991) 4
Yancey v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990) 4
New Orleans Times-Picayune, May 10, 1994 3

IN THE

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On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, of Louisiana

---

REPLY BRIEF OF PETITIONER

---

1. Respondent disingenuously seeks to wish away the constitutional infirmity embedded in the process by which petitioner received less than half of the fair market value of its property confiscated by respondent. Like others addressing an argument that is irrefutable, respondent seeks to do so by asserting that the challenge was waived below. This is flatly wrong.

Incredibly, respondent reproduces the questions presented in its appendix, even though questions 6 and 12 in the Court of Appeal brief plainly present the valuation issue presented in the petition. Opp. App. 7a-8a. Apparently, respondent assumed the Court would not bother to review the questions reproduced.

In any event, petitioner clearly presented to the Court of Appeal as an error the failure of respondent "to have

its appraisers conduct *bona fide* appraisals of the property at or near the date of trial valuation." In its brief to the Court of Appeal on that issue, petitioner specifically argued that the trial court violated the holding in *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), by allowing respondent to rely solely upon valuations of the property based on the date of confiscation and not as of the date of trial. Brief of Appellee/Cross-Appellant New Orleans 2000 Partnership, *Board of Comm'rs* v. *Missouri Pac. R.R.*, No. 93-CA-0755, at 22 (La. Ct. App. filed June 3, 1993).

To be sure, the petition presents that issue more sharply than it was raised in the Court of Appeal, but that is merely because the constitutional issue is the only question presented to this Court. Under any fair reading of the argument as presented in the Court of Appeal, the valuation issue presented here was squarely presented below and therefore has been preserved for review here.[1]

2. It is not surprising that respondent employs the "waiver" crutch to avoid review of the decision below by this Court. Respondent's defense of the manifestly erroneous process by which petitioner was deprived of more than half of the fair market value of its property is completely conclusory and without merit. Respondent quotes

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[1] Petitioner also clearly presented this issue in federal constitutional terms to the Louisiana Supreme Court in its petition for certiorari. In arguing that the admission of impermissible estimates was an issue that warranted that court's review, petitioner argued that "implicit in the . . . Fifth and Fourteenth Amendments to the United States Constitution is the obligation of the governmental entity to act consistently with the constitutions' principles of complete compensation and compliance with all the procedural safeguards and substantive restrictions imposed on the exercise of expropriation." Application of New Orleans 2000 Partnership for Writ of Certiorari to Review the Ruling of the Court of Appeal, *Board of Comm'rs* v. *Missouri Pac. R.R.*, Nos. 93-C-3088, 3100, at 23 (La. filed Dec. 16, 1993). There can be no serious question that the state courts were presented with the constitutional issue that now must be resolved by this Court.

the trial judge's statement about the "tremendous amount of . . . evidence" presented at trial, but ignores the critical language in that analysis, which is that all of respondent's evidence "used a different date of valuation." Opp. 2-3. Not only was that date different; it was also constitutionally invalid under *Kirby*, which is precisely petitioner's point.[2] The jury was deluged with evidence that was irrelevant, as a constitutional matter, to the proper fair market value determination. That the jury's verdict represents an obvious compromise between estimates based on the correct date of valuation and estimates based on an illegal date of valuation, demonstrates that the process employed by the Louisiana state courts deprived petitioner of just compensation. In sum, respondent's argument simply begs the question of whether the procedure was constitutionally permissible in light of *Kirby*.

---

[2] Respondent ultimately is forced to argue that a single, incredible statement made by its expert in rebuttal—that his market estimate would be unaffected by the property's ability to be used for gambling—is a sufficient basis upon which to allow a jury to ignore the only legally relevant estimates of the property's value. What makes exclusive reliance upon this one witness's bald statement particularly extraordinary is that since the petition was filed that witness, Jimmie Thorns, Jr., has been appointed to the Board of Commissioners of respondent. *See New Orleans Times-Picayune*, May 10, 1994, at C2.

Even giving the witness his due however, respondent assumes that somehow this point undermines certiorari when, in fact, it does no more than demonstrate the need for review. Petitioner's argument is that *Kirby* imposes a significant, constitutionally based requirement that "just compensation" be measured at the relevant time. This does not permit a governmental entity to put in evidence valuation estimates that are legally invalid and allow that evidence materially to reduce the just compensation verdict significantly below fair market value. Such a result would be rejected by both the Fourth and Federal Circuits and thus the decision of the Louisiana Court of Appeal that condones this departure from the requirement of just compensation warrants review by this Court.

As petitioner demonstrated in the petition, the proper approach under *Kirby* has been a matter of significant confusion and conflict among the lower courts. Pet. 16-20. Thus, as petitioner explained, both the Fourth and Federal Circuits have mandated methods of valuation that would have prevented the "compromise" verdict reached in this case that was based on constitutionally impermissible estimates of market value. See *United States* v. *69.1 Acres of Land*, 942 F.2d 290, 293 (4th Cir. 1991); *Yancey* v. *United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990). Respondent completely ignores this inconsistency in the holdings of the lower courts that have attempted to apply *Kirby*. It is, however, this problem in the law that justifies review by this Court of the decision below.

At the end of the day, this case presents a purely legal issue of the extent to which courts purporting to enforce the requirements of the Takings Clause can depart significantly from the norm of "just compensation" by permitting valuations that are improper under *Kirby* to be considered by the trier of fact. The only relevant evidence demonstrated without question that the property being taken had a value of at least $28 million. The only way to value this property at $13 million is to ignore its conceded "highest and best use" as a riverfront gambling facility. This is precisely what this Court's decision in *Kirby* forbids and what other federal courts would not countenance. Accordingly, the decision below should be reviewed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 93-1709

In The

Supreme Court of the United States

October Term, 1993

NEW ORLEANS 2000 PARTNERSHIP,

Petitioner,

vs.

BOARD OF COMMISSIONERS OF THE NEW ORLEANS EXHIBITION HALL AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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20PP

TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Denying the Writ	3
A. There Is No Federal Constitutional Issue In This Case.	3
B. The "Question Presented" In N.O. 2000's Petition Was Not Raised At The Appellate Court Level, And Thus, It Is Not Properly Before This Court.	6
Conclusion	7

TABLE OF CITATIONS

Cases Cited:

Graver Manufacturing Co. v. Linde Co., 336 U.S. 271 (1949) 5

Hanson v. Denckla, 357 U.S. 235 (1958) 6

Kirby Forest Products, Inc. v. United States, 467 U.S. 1 (1984) 2, 4, 5, 6, 7

Radio States WOW v. Johnson, 326 U.S. 120 (1945) 6

United States v. Johnson, 268 U.S. 220 (1925) 2

Contents

Page

United States Constitution Cited:

Fifth Amendment 5, 7

Fourteeenth Amendment 5, 7

Rule Cited:

Supreme Court Rule 15.1 1

APPENDIX

Appendix A — Excerpts of Trial Court Proceedings Dated December 10, 1992 ..... 1a

Appendix B — Excerpts of Petitioner's Original Brief in the Louisiana Fourth Circuit Court of Appeal 5a

No. 93-1709

In The

Supreme Court of the United States

October Term, 1993

NEW ORLEANS 2000 PARTNERSHIP,

Petitioner,

v.

BOARD OF COMMISSIONERS OF THE NEW ORLEANS HALL AUTHORITY,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

The Board of Commissioners of the New Orleans Exhibition Hall Authority ("NOEHA") hereby presents its Brief in Opposition to New Orleans 2000 Partnership ("N.O. 2000")'s Petition for a Writ of Certiorari (the "Petition") to assist this Honorable Court in the exercise of its discretionary jurisdiction in accordance with United States Supreme Court Rule 15.1.

STATEMENT OF THE CASE

In attempting to invoke the jurisdiction of this Court, petitioner, N.O. 2000, makes a contrived and disingenuous

argument. N.O. 2000 tries to transform a factual jury decision into a legal constitutional issue. In so doing, it misrepresents the facts.

The premise on which petitioner's entire position is based is the false proposition that the fair market value of the expropriated property as of the date of trial was "undisputed."[1] Despite this revisionist assertion (made several times), N.O. 2000's own Petition and the trial court record clearly show that NOEHA did indeed dispute petitioner's grossly exaggerated estimates of the fair market value of the property as of the date of the trial. More specifically, N.O. 2000 admits on page 8 of its Petition that one of NOEHA's appraisers, Mr. Jim Thorns, testified "over [N.O. 2000's] objection" regarding the fair market value of the property as of the date of trial. In its post-trial analysis, N.O. 2000, unable to sustain its objection, wishes the Court to ignore Mr. Thorns' testimony as "incompetent." Unfortunately for N.O. 2000, the jury apparently did not find the testimony to be incompetent. NOEHA respectively submits that review of the competency of evidence presented at expropriation trials conducted in state courts is not a proper exercise of this Court's jurisdiction. *See, e.g., United States v. Johnson,* 268 U.S. 220, 227 (1925).

N.O. 2000 also barely mentions in its Petition that the fair market value of the property at issue was determined by a jury on a question of fact after a tremendous amount of conflicting evidence was presented to the jury and after the jury was properly instructed pursuant to *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984). The truth is that there was conflicting, and therefore disputed, evidence presented at trial concerning the fair market value of the expropriated property. Prior to making its determination as to the property's fair market value, the jury was properly instructed pursuant to *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984). The Fourth Circuit Court of

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1. *See, e.g.,* pp. 2, 8, 10, 11, 12, and 16 of N.O. 2000's Petition.

Appeal of the State of Louisiana therefore found the jury verdict and market value to be reasonable and not manifestly erroneous.

REASONS FOR DENYING THE WRIT

A. There Is No Federal Constitutional Issue In This Case.

Petitioner, N.O. 2000, attempts an imaginative, but disingenuous, argument to transform a factual jury issue into a legal constitutional issue in an attempt to invoke the jurisdiction of this Court. Unfortunately, it misrepresents the record to do so. The premise of N.O. 2000's argument is the [false] assertion that the fair market value of the expropriated property at the time of trial was "undisputed." Like a revisionist, N.O. 2000 repeats this assertion several times. In affirming the trial court's award of $13 million, the Fourth Circuit Court of Appeal of the State of Louisiana made it abundantly clear that conflicting evidence as to the property's value was presented to the jury by both parties at trial and decided it was a factual determination:

> In this instance, Mr. Thorns' rebuttal testimony was sufficient to create *a question of fact* for the jury as to value. Secondly, even without this rebuttal testimony, the jury could have reasonably arrived at a value lower than New Orleans 2000's lowest estimate by comparing the methods of valuation and the comparables used by NOEHA's experts in its case in chief with those used by New Orleans 2000's experts, even though each set of experts used a different date of valuation.
>
> . . . . we had to examine the record to determine whether, based on the evidence presented, the jury's *factual determination of $13,000,000.00* as the appropriate compensation was

> reasonable. After having so examined the record, we do not find the jury's verdict to be unreasonable or manifestly erroneous. *There was a tremendous amount of competent but conflicting evidence presented to the jury.* Viewing the evidence as a whole, the jury could have reasonably found that the property was worth more than New Orleans 2000 paid for it in September of 1991, but less than the estimates of New Orleans 2000's experts.[2]

In effect, N.O. 2000 attempts to create a federal constitutional issue out of a jury's factual determination of competent but conflicting evidence. The truth is, a jury heard over 11 days of testimony from *both* parties as to the fair market value of the expropriated property as of the date of trial.[3] At the conclusion of this evidence, the trial court properly instructed the jury, in accordance with this Court's decision in *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984), that it should value the expropriated property as of the date of trial.[4] The jury then

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2. *See, e.g.,* pp. 22-23 of the Fourth Circuit's opinion, which can be found on pp. 21a-22a of Appendix A of N.O. 2000's Petition. [Emphasis supplied.]

3. It should be noted that N.O. 2000's two appraisers presented evidence that the fair market value of the property was $28.4 million and $32.36 million, respectively, while NOEHA's three appraisers presented evidence that the fair market value of the property was $5.534 million, $5.525 million, and $5.25 million, respectively. The day *after* NOEHA filed its expropriation suit, N.O. 2000 purchased the *entire* 72 acres, of which NOEHA expropriated *only* 22.85 acres, for $11 million.

4. *See, e.g.,* pp. 124-26 of volume 39 of the trial transcript, a copy of which is attached hereto as Appendix A, wherein the trial court instructed the jury that: (1) "[c]ompensation begins with the full fair market value of the property taken *as of today* . . . ; (2) "[y]our duty is to determine what, based on the evidence, is the fair market value of the property taken *now, as of the end of this trial* (Cont'd)

deliberated, and decided that the value of the property as of the date of trial was $13 million. The trial court subsequently rendered a judgment consistent with the jury's verdict, and after thoroughly reviewing the voluminous record of these proceedings, the Fourth Circuit Court of Appeal for the State of Louisiana affirmed the judgment as reasonable. As this Court aptly stated in *Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949):

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.

What N.O. 2000 really wants is for this Court to substitute its judgment regarding the value of the expropriated property for that of a jury which heard 11 days of conflicting trial testimony. Its reference to *Kirby Forest Products, Inc. v. United States* and the Fifth and Fourteenth Amendments is simply a transparent attempt to mislead this Court into believing that a federal constitutional issue exists in this litigation. It does not.

(Cont'd)
today . . .;" (3) "[a] person may be able to purchase land at below fair market value and/or purchase land that later rises in value. If so, a landowner is entitled to the benefit of his bargain, that is, the difference between the low price of landowner paid for the land and the amount the land is actually worth when put to its highest and best use *as of today, which is the end of trial;*" (4) "[i]n deciding the compensation to New Orleans 2000 for the land expropriated, you must determine what, based on the evidence, is the fair market value of the property taken *now, as of the end of the trial . . .*" [Emphasis supplied]. Curiously, N.O. 2000 argued in its Original Brief to the Fourth Circuit Court of Appeal that "[t]he district court correctly held and instructed the jury that the date of valuing the property at issue was the date of trial." *See, e.g.*, p. 33 of N.O. 2000's Original Brief, a copy of which is attached hereto as Appendix B.

B. The "Question Presented" In N.O. 2000's Petition Was Not Raised At The Appellate Court Level, And Thus, It Is Not Properly Before This Court.

Irrespective of whether there is a federal constitutional issue involved in this case, this is the first forum in which N.O. 2000 has raised the issue of "[w]hether the valuation of an expropriated parcel which is less than one-half of the parcel's fair market value at the time of trial is inconsistent with this Court's decision in *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984), interpreting the Just Compensation Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment."[5] In fact, N.O. 2000 raised 27 issues in its lengthy appellate brief to the Fourth Circuit of Appeal, and the above-stated issue was not included therein. A copy of that portion of N.O. 2000's appellate brief containing its "Issues Presented For Review" is attached hereto as Appendix B.

The law is clear that this Court cannot consider an issue which was not raised at the appellate court level. *See, e.g., Radio State WOW v. Johnson,* 326 U.S. 120, 128 (1945) and *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958). In the instant case, N.O. 2000 did not raise the above-mentioned issue in its brief to the Fourth Circuit Court of Appeal. Therefore, it cannot properly raise that issue with this Court.

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5. *See, e.g.,* the "Question Presented" at p. i of N.O. 2000's Petition.

CONCLUSION

N.O. 2000's Petition for a Writ of Certiorari should be denied. Despite N.O. 2000's reference to this Court's decision in *Kirby Forest Products, Inc. v. United States,* 467 U.S. 1 (1984) and the Fifth and Fourteenth Amendments, there is no federal constitutional issue in this case. The trial court properly instructed the jury, in accordance with *Kirby* and the Fifth and Fourteenth Amendments, that they should determine the property's value as of the day of trial. That is exactly what the jury did after hearing 11 days of competent and conflicting evidence of the market value of the property at issue.

Furthermore, the issue presented by N.O. 2000 in its Petition was not raised in its brief to the Fourth Circuit Court of Appeal. Thus, that issue is not properly before this Court.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF TRIAL COURT PROCEEDINGS DATED DECEMBER 10, 1992

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 91-16839
C/W 92-4155
DIVISION "J"

BOARD OF COMMISSIONERS, ET AL

VS.

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.

Testimony and notes of evidence, taken in the above-mentioned cause, before the HONORABLE GEORGE C. CONNOLLY, JR., on the 10th day of December, 1992.

APPEARANCES:

SAM A. LEBLANC, III, ESQ.
PHILIP A. FRANCO, ESQ.
TODD R. THOMAS, ESQ.
JOSEPH E. BERRIGAN, ESQ.
JEFFREY BENNETT, ESQ.
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JOSEPH SPILLMAN, ESQ.
Representing New Orleans 2000

Appendix A

REPORTED BY:

BARBARA A. BURGER
CERTIFIED SHORTHAND REPORTER

* * *

[Commencing at page 124]

* * *

. . . instructed you today.

Compensation begins with the full fair market value of the property taken as of today, at its highest and best use in the foreseeable or not too distant future.

In determining how much compensation is due to the landowner-developer, you are instructed that the landowner-developer's right to use property for business pursuits in hope of generating a profit is clearly one of the rights which flows from property ownership.

Your duty is to determine what, based on the evidence, is the fair market value of the property taken now, as of the end of this trial today, at its highest and best use in the not too distant future.

A person may be able to purchase land at below fair market value and/or purchase land that later rises in value. If so, a landowner whose land is expropriated is entitled to the benefit of his bargain, that is, the difference between the low price the landowner paid [125] for the land and the amount the land is

actually worth when put to its highest and best use valued as of today, which is the end of the trial. The gain or loss on the land belongs to the landowner and not the expropriating agency.

The determination of what amount would compensate the owner of a property right to the full extent of his loss must be made on the evaluation of the facts of each case and the uniqueness of the thing taken.

In deciding the compensation to New Orleans 2000 for the land expropriated, you must determine the fair market value as of today of the 22.85 acres being taken.

Fair market value is the value which a willing purchaser would pay and a willing seller would accept today, after exposure on the market for a reasonable length of time, neither being under a compulsion to sell or to buy, considering the best and highest use for which the property is suited in the reasonably foreseeable future.

[126] In determining fair market value of the property taken at its highest and best use as of today, you must look forward to the reasonably probable highest and best use of the land in the future. It is not relevant and your evaluation should not be affected by whether the owner would receive more or less than he paid for the property. Your duty is to determine what, based on the evidence, is the fair market value of the property taken now, as of the end of the trial, at its highest and best use in the reasonably foreseeable distant future.

Some factors to be considered in determining highest and best use are: proximity to areas already developed in a manner compatible with the intended use; action already taken to develop

land for that use; scarcity of land available for that use; use permitted by zoning ordinances; use to which the property is being put at the time of taking; existence of offers to buy property by those wanting to develop residential property or by those wanting

. . . .

APPENDIX B — EXCERPTS OF PETITIONER'S ORIGINAL BRIEF IN THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

* * *

7. THE TRIAL COURT CORRECTLY HELD THE VALUATION DATE TO BE THE DATE OF TRIAL.

A. The *Kirby* Decision Controls the Issue As A Matter of the U.S. Constitution

The district court correctly held and instructed the jury that the date of valuation of the property at issue was the date of trial. The simplest reason why the district court's decision in this regard should be affirmed is because the United States Supreme Court says it should. In *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 104 S.Ct. 2187 (1984), the high court held that the 5th Amendment of the U.S. Constitution requires that the date of valuation in a "regular" expropriation suit, such as the one at hand, cannot be earlier than the date of trial: The court noted that in a regular condemnation the "taking" occurs only upon payment. 104 S.Ct. at 2194. While the court may adopt the date of trial as the date of valuation for convenience purposes, "if the result of that approach is to provide the owner substantially less than the fair market value of his property on the date the [expropriator] tenders payment, it violates the Fifth Amendment." *Id.* at 2198, Syl. pts. 41-43.

* * *

Appendix B

* * *

IV. *ISSUES PRESENTED FOR REVIEW*

1. Where the United States Supreme Court has ruled the date of valuation in a "regular" expropriation case may not be any earlier than the date of trial, does the district judge err in charging the jury to value the property as of the date of trial?

2. Where there can be no taking unless and until the expropriating agency first obtains a lawful judgment and *pays* full compensation thereunder to the property owner, does it now follow that the date of valuation would be set as of date of trial, or date of payment is same if delayed?

3. Is not expropriation in derogation of customary property rights and therefore to be strictly construed against the expropriator and liberally construed in favor of the landowner?

4. Can a property owner in Louisiana, consistent with the Constitution, be deprived of Art. I, § 4 rights to "acquire, own, control, use, enjoy, protect and dispose of private property" by a public need "announcement" or threat of expropriation, but without the due process of law and compensation being paid in advance of the dispossession?

5. If the expropriating agency may not expropriate unless and until it fully and strictly complies with the statutory prerequisites, which include payment of a judgment first obtained, how can that agency claim to "freeze", limit or take one's rights to buy, use or sell one's property by merely announcing that it wants or has a need for one's property?

6. Can the constitutional right of a citizen to own, use and alienate property, and to be free from confiscation without due process and being paid "the full extent of his loss," be consistent with NOEHA's theory that it has no obligation to pay fair market value if the owner will "make a profit?" If not, does not the Constitution prevail?

7. Is not the contract lawfully executed on June 11, 1991 by which N.O. 2000 obtained the legal right to buy the 72 acre tract from MOPAC for $11 million a "property right" of N.O. 2000 under the Louisiana and United States Constitutions?

8. Does not the constitutional right to receive full fair market value for property taken by the government include the right to the benefit of any bargain lawfully contracted for, particularly where the contract was signed three months prior to the expropriation?

9. On June 11, 1991, did not MOPAC have the right to bind itself to sell, and N.O. 2000 bind itself to buy, the 72 acre tract, and if so, upon subsequent expropriation of part, is not N.O. 2000, as the transferee of those property rights, entitled to receive the full fair market value thereof, including market value arising from the intervening legalization of riverboat gaming?

10. If MOPAC had kept the property, rather than agreeing in June of 1991 to sell it to N.O. 2000, would not NOEHA herein have been obligated to pay the same $13 million fair market value? That being the case, why should NOEHA pay less to MOPAC's transferee?

11. If there exists no case in which the property owner was paid less than the fair market value of the *land* taken, even when the land was purchased after the expropriation suit was filed, was the district court wrong in rejecting NOEHA's suggestion that it need

only pay to N.O. 2000 up to the amount paid by N.O. 2000 for the land, regardless of a higher actual fair market value as of the date of valuation?

12. Should not the district court have granted (1) judgment n.o.v. for at least $28,4000,000 to N.O. 2000 upon the failure of NOEHA to have its appraisers conduct *bona fide* appraisals of the property at or near the date of trial valuation date; or alternatively (2) a new trial on both the "taking" and/or the "valuation" issues?

13. Where the trial court correctly ruled in advance of trial that the valuation date was the date of trial and not the date of suit and N.O. 2000's appraisers valued the property as of the expected trial date at $28.4 to $32.4 million; and where NOEHA's counsel chose to have its experts appraise the property as of September 11, 1991, must not the appellate court, if not the trial court, enter judgment for at least $28.4 million, the lesser of the proper valuation date amounts as to which testimony was adduced?

14. Does not L.R.S. 19:2.2 require an expropriating agency to fully comply with all of its stated requirements before filing an expropriation suit?

15. Would not the failure of an expropriator to comply with any of the prerequisites to filing suit set forth in L.R.S. 19:2.2 make any suit filed by the expropriator void and ineffective?

16. May an agency like NOEHA that is statutorily obligated to abide by the laws and "other ordinances of The City of New Orleans" take 10.85 acres of private property for the purpose of truck marshalling where, under the City Charter, no public body is allowed to make use of property inconsistent with any part of New Orleans's Master Plans, where that acreage is no longer "needed" by NOEHA for truck marshalling and where use of that acreage for

truck marshalling is inconsistent with New Orleans long range development plans.

17. Where the expropriator's own consultants suggest a need of no greater than 900,000 square feet of exhibition space, and users prefer a downriver location, was it error and unreasonable for the trial court to award to NOEHA 12 acres of upriver riverfront land to expand to 1.1 million square feet?

18. Where riverfront development would be best served by a shorter building providing the requisite square footage expansion, is not the agency unreasonable and arbitrary in takin more land than is absolutely necessary?

19. Where the trial judge rules in advance of the valuation trial that the knowledge of potential expropriation by N.O. 2000 is irrelevant, should NOEHA's counsel have abided by the ruling? Was the failure to do so unfairly prejudicial?

20. Where a state agency seeks to expropriate 10.85 acres for commercial truck marshalling or car parking purposes, does not it violate the prescription of La. Const. Art. I, § 4 against of commercial business enterprises?

21. Where counsel for NOEHA ignored the trial court's ruling and argued to the jury that N.O. 2000 should not be allowed to profit from "our" public funds, was the trial judge not correct in charging the jury to award fair market value even if same resulted in a "profit?"

22. Where the trial judge's public necessity judgment of July 8, 1992 predicates any taking on the payment of the final judgment of fair market value, attorney's fees and costs, does not the Court

err in signing, at NOEHA's request, an order of appeal, thus inadvertently divesting itself of jurisdiction to complete the compensation process?

23. Is not the district judge obliged to award attorney's fees to a property owner to whom NOEHA sought to pay only $4.36 million through trial, and who offered the owner's predecessor in title only $5.5 million (actually offering N.O. 2000 nothing prior to filing suit), where the jury awarded $13 million, or almost 250-300% of these respective amounts?

24. Was not the compensation "to the full extent of his loss" referred to in La. Const. Art. I, § 4 meant to include payment of attorney's fees in a situation like this one?

25. Should the appellate court award attorney's fees or should it remand to the district judge to render the award based upon his more complete knowledge of factors relevant to valuing the services rendered?

26. Where a party has received the expert reports of and deposed the defendant's valuation experts, and knowingly calls his own experts in his case in chief to testify as to valuation as of an incorrect valuation date, is it not beyond the scope of proper rebuttal to attempt to place the same witness on the stand to again testify as to his valuation results or methods? Should not the trial judge exclude such testimony?

27. Where the trial court provides charges requested by NOEHA, or follows authorities cited by NOEHA and fairly apprises the jury of the applicable law, does he commit manifest error?

* * *